NO. 81-2327

Office - Supreme Court, U.S.
FILED
JUN 17 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DOLORES FACIANE, WIFE OF
JOSEPH C. DeBATTISTA,

Petitioner

versus

ARGONAUT-SOUTHWEST INSURANCE
COMPANY, ET AL,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

ABBOTT J. REEVES
P. O. BOX 465
419 DERBIGNY STREET
GRETNA, LOUISIANA 70054
TELEPHONE: (504) 367–1212

ATTORNEY FOR PETITIONER

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DOLORES FACIANE, WIFE OF
JOSEPH C. De BATTISTA,

Petitioner

vs.

ARGONAUT-SOUTHWEST INSURANCE COMPANY,
ET AL

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR PETITIONER

TO: THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

Petitioner, Dolores Faciane, wife of Joseph C. DeBattista, plaintiff-relator in the Court below, prays that a writ of certiorari issue to review the judgment entered by the Supreme Court of the State of Louisiana in this case.

QUESTIONS PRESENTED

I. Whether the petitioner was denied right to trial on issue of quantum of award, in violation of the right to trial under the Seventh Amendment to the United States Constitution.

II. Whether the Supreme Court of the State of Louisiana erred in remanding case to intermediate State Court of Appeals for determination of award of quantum without evidence under oath but based only on representations of counsel in briefs (not written under oath) in violation of the right to due process under United States Constitution Amendment 5 and Amendment 7.

III. Whether the issue of award of quantum can be remanded to an intermediate state court of appeals despite fact the trial record and trial judgment is devoid of evidence that quantum was considered and devoid of evidence pertaining to amount of damages suffered by petitioner, in violation of right to due process and right to trial and right to compulsory porcess of witnesses in violation of the United States Constitution Amendment 5 and Amendment 7.

IV. Whether petitioner was denied remand to trial court for an evidentiary hearing or trial on the quantum of award because she is a woman and/or not head of household, in violation of the 10th and 14th Amendments to the United States Constitution.

INDEX

Page

Questions Presented i

Index iii

Citations vi

Opinion Below 1

Jurisdiction 1

Constitutional Provisions Involved 1

Statement of the Case 1

Reasons for Granting the Writ:

I. WHETHER THE PETITIONER WAS DENIED RIGHT TO TRAIL ON ISSUE OF QUANTUM OF AWARD, IN VIOLATION OF THE RIGHT TO TRIAL UNDER THE 7TH AMENDMENT TO THE UNITED STATES CONSTITUTION 3

II. WHETHER THE SUPREME COURT OF THE STATE OF LOUISIANA ERRED IN REMANDING CASE TO INTERMEDIATE STATE COURT OF APPEALS FOR DETERMINATION OF AWARD OF QUANTUM WITHOUT EVIDENCE UNDER OATH BUT BASED ONLY ON REPRESENTATIONS OF COUNSEL IN BRIEFS (NOT WRITTEN UNDER OATH) IN VIOLATION OF THE RIGHT TO DUE PROCESS UNDER UNITED STATES CONSTITUTION AMENDMENT 5 AND AMENDMENT 7 3

INDEX CONTINUED

Page

III. WHETHER THE ISSUE OF AWARD OF QUANTUM CAN BE REMANDED TO AN INTERMEDIATE STATE COURT OF APPEALS DESPITE FACT THE TRIAL RECORD AND TRIAL JUDGMENT IS DEVOID OF EVIDENCE THAT QUANTUM WAS CONSIDERED AND DEVOID OF EVIDENCE PERTAINING TO AMOUNT OF DAMAGES SUFFERED BY PETITIONER, IN VIOLATION OF RIGHT TO DUE PROCESS AND RIGHT TO TRIAL AND RIGHT TO COMPULSORY PROCESS OF WITNESSES IN VIOLATION OF THE UNITED STATES CONSTITUTION AMENDMENT 5 AND AMENDMENT 7 4

IV. WHETHER PETITIONER WAS DENIED REMAND TO TRIAL COURT FOR AN EVIDENTIARY HEARING OR TRIAL ON THE QUANTUM OF AWARD BECAUSE SHE IS A WOMAN AND/OR NOT HEAD OF HOUSEHOLD, IN VIOLATION OF THE 10TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION 5

Conclusion 7

Certificate of Service 8

APPENDIX:

APPENDIX A

Opinion of Supreme Court of Louisiana *DeBattista vs. Argonaut, et al,* 403 So.2d 26 (1981) A-1

INDEX CONTINUED

Page

APPENDIX B

Motion and Order for Remand to Civil District Court for Determination of Quantum Awards A-18

APPENDIX C

Brief on Remand by Petitioner in Support of Damages . A-22

APPENDIX D

Respondent's Memorandum in Opposition to Plaintiff's Motion to Remand A-73

APPENDIX E

Respondent's Brief on Damages A-75

APPENDIX F

Opinion of Court of Appeal of Louisiana, Fourth Circuit, *De Battista vs. Argonaut, et al,* 410 So.2d 279 (1982) A-80

APPENDIX G

Petitioner's Application for Writ of Certiorari with Brief filed February 26, 1982. Docket No. 82-C-0493 ..... A-82

APPENDIX H

Respondent's Opposition to Petitioner's Application for Writ on Issue of Quantum, Docket No. 82-C-0493 .. A-94

APPENDIX I

Supreme Court of Louisiana Notice of Writ Denied, Docket No. 82-C-0493, dated March 19, 1982 ..... A-96

APPENDIX J

Reasons for Judgment in Civil District Court, dated March 23, 1978 ..... A-97

CITATIONS

Page

28 U.S.C. 2101 1

Louisiana Constitution Article 5, Section 10 5

Louisiana Constitution Article 5, Section 16 5

Chappuis v. Sears Roebuck & Co., 358 So.2d 926 (La. 1978) 2

Craig v. Boren, 429 U.S. 190 (1976) 7

DeBattista v. Argonaut, 403 So.2d 26 (1981) 2

Dorry v. Lafleur, _____ So.2d _____ (La. 1981) 2

Frontiero v. Richardson, 441 U.S. 677 (1973) 5

Holland v. Buckley, 305 So.2d 113 (La. 1974) 2

Kirchberg v. Feenstra, _____ U.S. _____ (1980) 7

Orr v. Orr, 440 U.S. 268 (1979) 6

Reed v. Reed, 404 U.S. 71 (1971) 6

Stanton v. Stanton, 421 U.S. 7 (1975) 6

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 6

OPINION BELOW

The opinion of the Supreme Court of Louisiana is reported at 403 So.2d 26 (1981), and is annexed to this petition as Appendix "A", *infra*. The opinion of the Court of Appeals of Louisiana, Fourth Circuit is reported at 410 So.2d 279 (1982), and is annexed to this petition as Appendix "F", *infra*. The Notice of Writ Denied, without opinion, dated March 19, 1982, has not yet been reported. It is annexed to this petition as Appendix "I", *infra*.

JURISDICTION

Petitioner's application for discretionary review was denied by the Supreme Court of Louisiana on March 19, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. 2101.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments 5, 7, 10 and 14.

STATEMENT OF THE CASE

Mrs. Joseph C. DeBattista contracted hepatitis following a blood transfusion. She and her husband sued, among others, the Southern Baptist Hospital Blood Bank, the processor and distributor of the blood transfused, and the blood bank's liability insurer.

The Court of Appeals of Louisiana affirmed the district court's dismissal of the suit, finding that the plaintiffs failed to prove that the blood was unwholesome or that Mrs. DeBattista contracted hepatitis from this source. The district judge, however, either resolved these factual issues differently or never reached them. He dismissed the suit stating only

that there could be no implied warranty in connection with the sale of the blood and that there was no proof of negligence in its preparation, storage or infusion.

The Supreme Court of Louisiana granted certiorari to consider the correctness of the factual findings and the district court holding that a blood bank which distributes diseased blood without negligence cannot be held for damage caused to a person who contracts hepatitis after a transfusion because of its unwholesome condition.

In *DeBattista v. Argonaut*, 403 So.2d 26 (1981), the Supreme Court of Louisiana held the defendant hospital and its insurers were strictly liable to Mrs. BeBattista, petitioner herein, and in its opinion stated,

> "* * *Because the defendants prevailed in both lower courts, no assessment of the plaintiffs' damages has been made. Therefore, the case will be remanded to the court of of apeal for an assessment of quantum. *Dorry v. Lafeur*, _____ So.2d _____ (La. 1981), No. 80–C–2440; *Chappuis v. Sears Roebuck & Co.*, 358 So. 2d 926 (La. 1978); *Holland v. Buckley*, 305 So.2d 113 (La. 1974).
> REVERSED AND REMANDED TO COURT OF APPEAL"

The petitioner herein immediately made a Motion To Remand to Civil District Court for Determination of Quantum Awards (See Appendix "B", *infra*). The Court of Appeals of Louisiana denied the Motion, without a record or any testimony under oath regarding damages - - even without an original judgment from the Trial Court (See Appendix "F", *infra*). The petitioner made application for a writ to the Supreme Court of Louisiana, again seeking a trial on

the issue of quantum inasmuch as no testimony had been taken in this regard in the trial court; neither did the trial judgment reflect any consideration of quantum of award (See Appendix "G", *infra*). The Supreme Court of Louisiana denied the writ application, without a written opinion (see Appendix "I", *infra*).

Petitioner raised substantial constitutional questions in her appeals and writ applications in the state courts. Petitioner did not have the benefit of a trial to resolve her claim for determination of damages awarded by the Supreme Court of Louisiana. Petitioner was denied the right of compulsory service of process of witnesses to prove her damages. Petitioner was denied due process by virtue of Court of Appeals of Louisiana using unverified representations of counsel on which to base a determination of quantum of award. Petitioner was a victim of sex discrimination and denied equal protection as a non-head of household in the failure to get a trial and by the *ex parte* determination of quantum of award by the Court of Appeals of Louisiana.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE PETITIONER WAS DENIED RIGHT TO TRIAL ON ISSUE OF QUANTUM OF AWARD, IN VIOLATION OF THE RIGHT TO TRIAL UNDER THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II. WHETHER THE SUPREME COURT OF THE STATE OF LOUISIANA ERRED IN REMANDING CASE TO INTERMEDIATE STATE COURT OF APPEALS FOR DETERMINATION OF AWARD OF QUANTUM WITHOUT EVIDENCE UNDER OATH BUT BASED ONLY ON REPRESENTATIONS OF COUNSEL IN BRIEFS (NOT WRITTEN UNDER OATH) IN VIOLATION OF THE RIGHT TO DUE PROCESS

UNDER UNITED STATES CONSTITUTION AMENDMENT 5 AND AMENDMENT 7.

III. WHETHER THE ISSUE OF AWARD OF QUANTUM CAN BE REMANDED TO AN INTERMEDIATE STATE COURT OF APPEALS DESPITE FACT THE TRIAL RECORD AND TRIAL JUDGMENT IS DEVOID OF EVIDENCE THAT QUANTUM WAS CONSIDERED AND DEVOID OF EVIDENCE PERTAINING TO AMOUNT OF DAMAGES SUFFERED BY PETITIONER, IN VIOLATION OF RIGHT TO DUE PROCESS AND RIGHT TO TRIAL AND RIGHT TO COMPULSORY PROCESS OF WITNESSES IN VIOLATION OF THE UNITED STATES CONSTITUTION AMENDMENT 5 AND AMENDMENT 7.

The Seventh Amendment of the United States Constitution is explicit that "the right of trial (by jury) shall be preserved. . ." The petitioner herein was denied a right to trial where the value of the controversy exceeded twenty dollars. She did not seek a jury trial. She had a bench trial, by judge only, who considered liability only. The trial judge did not consider any quantum of award as he found no liability (see Appendix "J", *infra*). When, eventually after appellate review, liability was found against defendants, the Supreme Court of Louisiana should have remanded the case to the trial court for a trial on the determination of quantum of damages to be awarded. Erroneously, the Supreme Court of Louisiana denied petitioner the right to trial (by judge or jury). Actually, she should have been allowed to request a jury. In any event, there was no evidence, not even an earlier judgment on which the Court of Appeals could base its finding. It simply relied on unverified representations by counsel in briefs on which to base its finding.

By this action, petitioner was also denied access to the

Courts and denied due process as guaranteed by the Fifth Amendment.

There was no waiver of a trial, either of a jury trial or bench trial.

The Court of Appeals of Louisiana does not have trial jurisdiction. It only has *appellate* jurisdiction. Louisiana Constitution Article 5, Section 10. Even while it can consider *facts and law*, it is only by *appellate* review. In the instant case it made a decision without a lower court judgment or record or testimony, but pulled evidence "out of the air" on which to base its opinion, denying petitioner a right to trial. Only the District Courts in Louisiana have *original* jurisdiction in civil matters. Louisiana Constitution Article 5, Section 16.

The petitioner herein is not asking for a new trial, but for an original trial on the determination of quantum of awards which she never had in the first place.

IV. WHETHER PETITIONER WAS DENIED REMAND TO TRIAL COURT FOR AN EVIDENTIARY HEARING OR TRIAL ON THE QUANTUM OF AWARD BECAUSE SHE IS A WOMAN AND/OR NOT HEAD OF HOUSEHOLD, IN VIOLATION OF THE 10th AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The petitioner argues that the result of the Supreme Court would not have been the same had she not been a woman or a non-head of household. The case of *Frontiero v. Richardson*, 441 U.S. 677 (1973), presents a high water mark of a certain kind against sex discrimination. Four members of the Court - - Justices Douglas, Brennan, White, and Marshall - - took the view that sex is a suspect classification and

ought to be treated like a racial classification. Four other members of the Court, who also voted to strike down the Armed Forces regulation, did so in the fudging way that the Court had in *Reed v. Reed*, 404 U.S. 71 (1971). That is, they said that this distinction between men and women was arbitrary. Only Justice Rehnquist dissented.

A similar case, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), two years later, involved a provision of the Social Security Act which awarded social security benefits to the widow of a deceased wage earner who had a minor child at home. But that provision of the Social Security Act did not give such benefits to a similarly situated widower - - to the husband of a deceased female wage earner even if that husband had a minor child at home. The Court perceived this as discrimination against the deceased female wage earner. Her husband and child did not get social security benefits.

The Court struck down a discrimination case in 1975 called *Stanton v. Stanton*, 421 U.S. 7 (1975). It involved a Utah statute which obliged parents to support male children to the age of twenty-one, but female children only to the age of eighteen. The notion obviously was that boys went on to college and girls did not, and therefore boys required a longer period of support. The Court had little difficulty finding that to be a violation of equal protection.

Oklahoma permitted the sale of 3.2 percent beer to girls at the age of eighteen; boys could not buy it until they were twenty-one. The Court found this violated equal protection.

Three years ago, in 1979, the Court decided *Orr v. Orr*, 440 U. S. 268 (1979). It involved an Alabama statute that provided that only wives could get alimony; husbands could not. This again was a plain discrimination against men. The Court held that it violated equal protection.

The case of discrimination against women was called *Kirchberg v. Feenstra*, _____ U.S. _____ (1980). This case dealt with the question of sex discrimination. It involved a Louisiana statute that gave exclusive control of community property to the husband of a married couple. Without dissent, the Court found a violation of equal protection. Justice Marshall wrote an opinion for seven members of the Court, relying on the test of *Craig v. Boren*, 429 U.S. 190 (1976). He said this discrimination, in order to survive equal protection challenge, must be substantially related to an important government interest, and it just is not. There is no substantial basis, he reasoned, no important interest, for giving exclusive control over community property in every instance to the husband of a married couple.

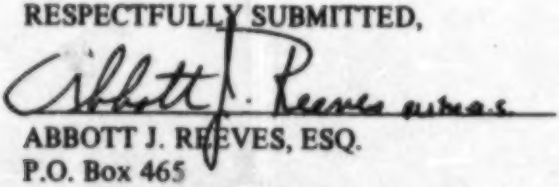
The petitioner, in the instant case, Mrs. DeBattista, argues that because she is a woman she did not succeed in having her Motion for Remand for Trial in District Court granted. Also, because she is not head of a household, but "only a wife," she was denied a trial for determination of quantum of award for her damages.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

This the 17th day of June, 1982.

RESPECTFULLY SUBMITTED,

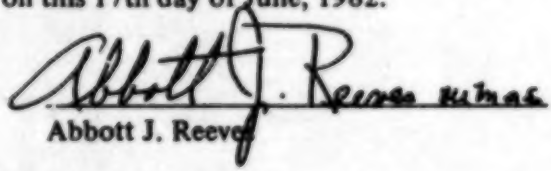


ABBOTT J. REEVES, ESQ.
P.O. Box 465
419 DERBIGNY STREET
GRETNA, LOUISIANA 70054
TELEPHONE: (504) 367–1212

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition For Writ of Certiorari have been sent to William S. Penick, Esq., Attorney for Respondent, Argonaut-Southwest Insurance Company, at Lemle, Kelleher, Kohlmeyer and Matthews, 601 Poydras Street, 21st Floor, New Orleans, Louisiana 70130, by placing them in the United States Mail, postage prepaid, on this 17th day of June, 1982.



Abbott J. Reeves

APPENDIX A

Dolores Faciane, wife of/and Joseph C. DeBATTISTA

v.

ARGONAUT-SOUTHWEST INSURANCE COMPANY, et al.

No. 80-C-1772.

Supreme Court of Louisiana.

June 22, 1981.

Dissenting Opinion Sept. 17, 1981.

Rehearing Denied Sept. 18, 1981.

DENNIS, Justice.

One of the plaintiffs, Mrs. Joseph C. DeBattista, contracted hepatitis following a blood transfusion. She and her husband sued among others the Southern Baptist Hospital Blood Bank, the processor and distributor of the blood transfused, and the blood bank's liability insurer.

The court of appeal, 385 So.2d 518, affirmed the district court's dismissal of the suit, finding that the plaintiffs failed to prove that the blood was unwholesome or that Mrs. DeBattista contracted hepatitis from this source. The district judge, however, either resolved these factual issues differently or never reached them. He dismissed the suit stating only that there could be no implied warranty in connection with the sale of the blood and that there was no proof of negligence in its preparation, storage or infusion. We granted certiorari to consider the correctness of the factual findings and the district court holding that a blood

bank which distributes diseased blood without negligence cannot be held for damage caused to a person who contracts hepatitis after a transfusion because of its unwholesome condition.

Facts

Mrs. DeBattista had surgery performed at Southern Baptist Hospital on February 14, 1973. Her treating physician ordered a transfusion of three units of blood in conjunction with the surgery and post-operative care. Each unit had been drawn and processed by the Southern Baptist Hospital Blood Bank and administered by Southern Baptist Hospital personnel. Roughly one month after the transfusions, Mrs. DeBattista began to experience symptoms of hepatitis. Her doctor diagnosed her condition as Type B serum hepatitis after hospitalizing her in mid-April.

A donor of one of the units of blood which Mrs. DeBattista had received was subsequently rejected as a donor because of a positive reaction to a hepatitis test. Robert Watson, a paid donor, gave one of the units of blood which Mrs. DeBattista received at Southern Baptist on January 28, 1973, and his blood was tested the next day. The testing did not disclose the presence of hepatitis. Watson had a history of mental disease and syphilis. Had he answered the screening questionnaire regarding venereal disease correctly, his donation of blood would have been rejected. Two months later, however, Watson again sought to give blood and was rejected after hepatitis testing conducted March 27, 1973 revealed a positive reaction indicating that he had been exposed to hepatitis virus at some time. The blood bank notified Watson that he had been disqualified as a donor and that he should consult a physician for further testing. The blood he had given the day before was destroyed. Watson's physician retested him and found no reaction on the hepatitis test. Watson's doctor and the blood bank personnel did not

notice that he had any visible symptoms of hepatitis.

The other two units of the transfusion administered to Mrs. DeBattista in February had been obtained by the blood bank from voluntary donors. The same procedures were followed as were used to obtain Watson's blood. There is no evidence in the record that these donors were suspected of having hepatitis.

The trial judge did not expressly determine whether Mrs. DeBattista contracted hepatitis from the transfusion. Since the court of appeal's judgment may constitute a reversal of the trial judge's implicit factual finding, however, we have carefully considered the pertinent evidence.

[1] In this civil case, the plaintiffs' burden is to prove causation by a preponderance of the evidence. This burden may be met either by direct or, as in this case, by circumstantial evidence. *Jordan v. Travelers Ins. Co.*, 257 La. 995, 245 So.2d 151 (1971); *Naquin v. Marquette Cas. Co.*, 244 La. 569, 153 So.2d 395 (1963).

[2] Taken as a whole, circumstantial evidence must exclude other reasonable hypotheses with a fair amount of certainty. This does not mean, however, that it must negate all other *possible* causes. Otherwise, the mere identification by the record of another possibility, although not shown to be causally active, would break the chain of causation. *Weber v. Fidelity & Cas. Ins. Co. of N.Y.*, 259 La. 599, 608–09, 250 So.2d 754, 757 (1971).

[3] The evidence shows that, approximately one month after receiving a transfusion of blood which came from defendant's blood bank, Mrs. DeBattista became ill with hepatitis. The medical evidence showed that this delay in manifestation of the disease is consistent with contagion through transfusion. The type hepatitis she had is most commonly contracted by blood transfusion. The risk of

contracting hepatitis through a transfusion is significantly higher when the blood is accepted from paid, rather than voluntary, donors. At the time the blood bank accepted the blood ultimately given Mrs. DeBattista, the test for this type hepatitis was only 30% effective. It is possible for a person carrying hepatitis virus to display no visible symptoms of illness. It is possible, also, for blood from a person infected with hepatitis to test positive on one occasion and negative on another. Under these circumstances, the most reasonable hypothesis for the cause of Mrs. DeBattista's hepatitis is that it entered her body with the blood she received from the blood bank.

The defendants have failed to produce any evidence which convinces us that the blood transfusion was not the most probable source of Mrs. DeBattista's hepatitis. The court of appeal stated Mrs. DeBattista might have contracted hepatitis from her sister. Her sister had contracted the disease one year earlier and was asymptomatic at the time Mrs. DeBattista entered the hospital in February. Expert testimony in the record establishes, however, that Type B hepatitis is generally transmitted parenterally, most commonly by a transfusion of hepatitis-infected blood. The timing of the onset of symptoms and the subsequent clinical diagnosis is also best explained by plaintiffs' theory that Mrs. DeBattista was exposed to hepatitis during her February hospitalization.

However, after reviewing the evidence, we are convinced that the trial court correctly found that the blood bank was not negligent in any respect. Accordingly, we must consider whether it can be held liable without a finding of negligence.

Liability for Distribution of Defective Blood Under Article 2315

Articles 2315–24 of the Louisiana Civil Code comprise

the code's entire chapter of legal principles regulating offenses and quasi-offenses.

The underlying principle is provided by Article 2315: "Every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it. * * *" The remaining articles constitute amplifications as to what constitutes "fault" and under what circumstances a defendant may be held liable for his act or that of a person or thing for which he is responsible. *Loescher v. Parr*, 324 So.2d 441 (La.1975).

Defendants of "fault" are actually indefinite generalities and usually not illuminating when applying the concept. Colin and Capitant have said that fault signifies that conduct which a man should not have engaged in—that is, that he has acted as he should not have acted. 2 Colin et Capitant, Cours elementaire de droit civil francais (8e Ed. 1935) § 190. Defining fault is a logomachy. Because of the difficulty in finding fault for all times and purposes and instead of defining fault by listing numerous activities which constitute fault (much as we enumerate the activities which constitute criminal conduct in our criminal code) our law has left this determination in the hands of the court. *Langlois v. Allied Chemical* Corp., 258 La. 1067, 1076, 249 So.2d 133, 137, (1971)

In defining "fault" for purposes of products liability in *Weber v. Fidelity & Cas. Co. of N. Y.*, 259 La. 599, 250 So.2d 754 (1971), this court held:

"A manufacturer of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person, who without fault on his part, sustains an injury caused by a defect in the design, composition, or manufacture of the article, if the injury mighi reasonably have been anticipated. However, the plaintiff claiming injury has the burden of proving that the product

was defective, i. e., unreasonably dangerous to normal use, and that the plaintiff's injuries were caused by reason of the defect." * * *

"If the product is proven defective by reason of its hazard to normal use, the plaintiff need not prove any particular negligence by the maker in its manufacture or processing; for the manufacturer is presumed to know the vices in the things he makes, whether or not he has actual knowledge of them." Id. 250 So.2d at 755-756.

Defendant blood bank contends that plaintiffs may not recover in tort under *Weber* because the blood was not defective, i. e., "unreasonably dangerous to normal use," for three reasons: (1) The judgment of whether the product is "unreasonably dangerous to normal use" must be based on the manufacturer's entire line or his total activity, rather than the single product used by plaintiff. (This is implicitly assumed by defendant, not expresely argued); (2) The social utility of the distribution of blood greatly outweighs the risk of its harm; and (3) Blood banks have no way of preventing distribution of the relatively small amounts of unwholesome blood that cause harm. In essence, defendant relies on an argument that the activity of distributing blood involves danger, but a reasonable danger which should be tolerated for its benefits, and that consumers must bear the cost of the inherent risks involved.

[4] Defendant's arguments, however, misconstrue the "unreasonably dangerous" limitation. These words were included within the definition of legal fault to prevent manufacturers from becoming insurers of their own products. "Unreasonably dangerous" means simply that the article which injured the plaintiff was dangerous to an extent beyond that which would be contemplated by an ordinary consumer.

The history of strict liability in Louisiana indicates the

requirement that a defective product must be "unreasonably dangerous" came into our jurisprudence due to the pervasive influence of section 402A of the Restatement (Second) of Torts after its publication in 1965. Louisiana's law in the products liability area has been described by commentators as closely approximating that of common law states following the Restatement (Second) of Torts § 402A. See Andrus, Strict Liability Under Civil Code Articles 2317, 2318, and 2321: An Initial Analysis, 25 La.Bar J. 105 (1977); Robertson, Manufacturers' Liability for Defective Products in Louisiana Law, 50 Tul.L.Rev. 50 (1975). This view has also been taken by federal courts interpreting Louisiana law. See *Perez v. Ford Motor Co.*, 497 F.2d 82 (5th Cir.1974); *Welch v. Outboard Marine Corp.*, 481 F.2d 252 (5th Cir.1973). After using the "unreasonably dangerous" limitation in *Weber* as a condition to legal fault under Article 2315, this court employed a similar requirement in summarizing the principles of legal fault under Articles 2317, 2318, 2320, 2321, 2322. We held that strict liability results from the conduct or defect of a person or thing which creates an "unreasonable risk" of harm to others. *Loescher v. Parr, supra.*

Furthermore, this court in *Loescher* clearly expressed the underlying reason for the legal fault arising from these code provisions, sometimes referred to as strict liability:

> "Thus, the person to whom society allots the supervision, care, or guardianship (custody) of the risk-creating person or thing bears the loss resulting from creation of the risk, rather than some innocent third person harmed as a consequence of his failure to prevent the risk." Id., 324 So.2d p. 446.

According to the original comment to Section 402A, a "defective condition" is one "not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Restatement (Second) Torts, § 402A comment g. Comment i, defining "unreasonably dangerous," states: "The article must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." See *Welch v. Outboard Marine Corp., supra; Loyocano v. Continental Ins. Co.*, 283 So.2d 302 (La.App. 4th Cir.1973). A consumer expectation approach is particularly appropriate in Louisiana which has aligned itself with those jurisdictions showing particular concern for consumer interests. *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc., 262* La. 80, 90, 262 So.2d 377, 381 (1972). Examples given in comment i make it clear that such innocuous products as sugar and butter, unless contaminated, would not give rise to a strict liability claim merely because the former may be harmful to a diabetic or the latter may aggravate the blood cholesterol level of a person with heart disease. Presumably such dangers are squarely within the contemplation of the ordinary consumer. *Cronin v. J. B. E. Olson Corp.*, 8 Cal.3d 121, 104 Cal.Rptr. 433, 441, 501 P.2d 1153, 1161 (1972). Prosser, the reporter for the Restatement, suggests that the "unreasonably dangerous" qualification was added to foreclose the possibility that the manufacturer of a product with inherent possibilities for harm (for example butter, drugs, whiskey and automobiles) would become "automatically responsible for all the harm that such things do in the world." Prosser, Strict Liability to the Consumer in California, 18 Hastings L.J. 9,23 (1966).

We recognize that the words "unreasonably dangerous" may serve the beneficial purpose of preventing the manufacturer from being treated as the insurer of its products. We conclude, however, that the term may be used only for

this purpose, and certainly not to burden the injured plaintiff with proof of an element which rings of negligence. Otherwise, the formulation of strict liability in practice rarely would lead to a different conclusion than would have been reached under the laws of negligence. *Cronin v. J. B. E. Olson Corp., supra,* 104 Cal.Rptr. at 442, 501 P.2d at 1162. See, Comment, 40 La.L.Rev. 207 (1979). Yet the very purpose of strict liability is to relieve the plaintiff from problems of proof inherent in pursuing negligence and warranty remedies, and thereby to insure that the costs of injuries resulting from defective things are borne by those responsible for them. See *Loescher v. Parr, supra,* at 446.

[5] Courts in a number of jurisdictions abrogated the requirement that the defect be "unreasonably dangerous," concluding that requiring plaintiff only to prove the existence of a defect is more consistent with the policies giving rise to products liability initially and lessens the risk that negligence elements are injected into the plaintiff's case. E. g., *Butand v. Suburban Marine & Sporting Goods, Inc.,* 543 P.2d 209 (Alaska 1975); *Cronin v. J. B. E. Olson Corp., supra; Glass v. Ford Motor Co.,* 123 N.J.Super. 599, 304 A.2d 562 (1973). In their view, the protective end of preventing the seller from becoming an insurer of his products is attained by the necessity of proving that there was a defect in the manufacture or design of the product and that such defect was a proximate cause of the injuries. We have determined, nevertheless, that the requirement of an unreasonable risk as a condition to strict liability should be retained. It must be carefully applied, however, with its true purpose in mind.

[6] Accordingly, we conclude that blood contaminated with hepatitis virus is defective, i.e., unreasonably dangerous to normal use. The risks involved in receiving a transfusion of blood in this condition are certainly greater than a reasonable consumer would expect. See, e.g., L. Frumer

and M. Friedman, Products Liability § 16A[4][f][i] at pp. 3B-124, 126 (1980); 1 M. Dixon, Drug Product Liability § 9.08[4] at pp. 9-119 (1980);Boland, Strict Liability in Tort for Transfusing Contaminated Blood, 23 Ark.L. Rev. (1969); Verlander, Article 2317 Liability: An Analysis of Louisiana Jurisprudence Since *Loescher v. Parr*, 25 Loy. L.Rev. 263, 268 (1979); Note, 71 Colum.L.Rev. 487 (1971); Note, 46 N.Y.U.L. Rev. 703 (1971).

Application of These Principles to the Present Facts

[7] In the present case, plaintiffs proved (a) that the blood which Mrs. DeBattista received by transfusion was defective, i. e., unreasonably dangerous to normal use, (b) that it was a product which had been processed and distributed by the defendant blood bank, (c) that Mrs. DeBattista's injury might reasonably have been anticipated by one having actual or constructive knowledge of the defect, and (d) that Mrs. DeBattista's injuries were caused by reason of the defect. The defendants did not present any proof that the damage was caused by the fault of the plaintiffs. The blood bank, therefore, is liable to the plaintiffs.

Inapplicability of Article 1764

Defendant blood bank contends it cannot be held liable for damages caused another by its distribution of unwholesome blood unless the damaged person proves the harm resulted from the blood bank's negligence. However, for this proposition the blood bank relies on Article 1764, one of the general provisions on conventional obligations, which clearly does not govern tort liability.

Article 1764(A) sets forth general rules applicable to various classes of contracts. Among these, it provides that a

warranty is implied in every sale but may be modified or renounced, without changing the character of the contract or destroying its effect. Art. 1764(A)(2). As an exception to this general rule, Article 1764(B)(1) provides that the implied warranties of merchantability and fitness shall not be applicable to a contract for the sale of human blood, blood plasma or other human tissue or organs from a blood bank, and that such sales shall be considered sales of services, not commodities. That section provides: "Notwithstanding the provisions of Paragraph (A)(2) of this Article, the implied warranties of merchantability and fitness shall not be applicable to a contract for the sale of human blood, blood plasma or other human tissue or organs from a blood bank or reservoir of such other tissues or organs. Such blood, blood plasma or tissue or organs shall not for the purposes of this Article be considered commodities subject to sale or barter but shall be considered as medical services."

[8-10] To impose strict liability on the preparer and distributor of blood under the circumstances of this case, however, it was not necessary for plaintiffs to establish an implied warranty as defined by Article 1764. A distributor of blood is strictly liable in tort when blood he places on the market creates an unreasonable risk of harm to others and, in fact, results in injury or disease to a human being. Although strict liability can also be based on a theory of an implied warranty running from the manufacturer to the plaintiff, *Philippe v. Browning Arms*, 395 So.2d 310 (La.1981), *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, 262 La. 80, 262 So.2d 377 (1972), for the reasons set forth in *Weber* and this opinion, we think it clear that the liability is not one governed by the law of contractual warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to supersede Civil Code Article 2315 which serves the much broader purpose

of governing the liability of a manufacturer of processor to those injured by his defective products.

Moreover, Article 1764(B) is clear and free from all ambiguity. It abrogates nothing more than the *"warranty of merchantability and fitness"* implied by sales of blood. It provides that *"for the purposes of this Article"* only that blood, plasma, tissue and organs shall be regarded as services not commodities. To read between the lines of Article 1764 an unspoken legislative intent to modify the strict tort liability of blood banks under Article 2315, while curiously leaving intact blood banks' liability for their negligent acts under Articles 2315 and 2316, would disregard the letter of the law under the pretext of pursuing its spirit and violate our cardinal rule for the application and construction of laws. Article 13. Indeed, it would not even pursue the true spirit of our law which, as expressed by Articles 2315 and 2317, requires the person to whom society allots the supervision, care or guardianship of the risk-creating thing to bear the loss resulting from creation of the risk, rather than some innocent third person harmed as a consequence of his failure to prevent the risk. *Loescher v. Parr, supra,* at 446.

The court of appeal opinions disregarding the positive codal provisions under the pretext of pursuing their spirit do not represent correct interpretations of our law. E. g., *Martin v. Southern Baptist Hospital,* 352 So.2d 351 (La.App. 4th Cir.1977), *writ denied,* 354 So.2d 210 (La. 1978); *Adams v. New Orleans Blood Bank, Inc.,* 343 So.2d 363 (La.App. 4th Cir.1977); *Juneau v. Interstate Blood Bank, Inc. of Louisiana,* 333 So.2d at 354 (LaApp.3d Cir.), *writ denied,* 337 So.2d 220 (La.1976); *Koppenol v. St. Tammany Parish Hospital,* 341 So.2d 1242 (La.App. 1st Cir.1976), *writ denied,* 343 So.2d 1067 (La. 1977). The refusal of writs by this court, which is usually based upon incomplete records and ex parte applications and without hearing, is not decisional law. *Garlington v. Kingsley,* 289

So.2d 88 (La.1974). In a civilian jurisdiction such as ours, in which courts are bound to follow the positive law, case law should not supplant legislative or constitutional authority. *Ardoin v. Hartford Accident & Indemnity Co.*, 360 So.2d 1331 (La.1978); *Garlington v. Kingsley, supra.*

Conclusion

Because the defendants prevailed in both lower courts, no assessment of the plaintiffs' damages has been made. Therefore, the case will be remanded to the court of appeal for an assessment of quantum. *Dorry v. Lafleur*, 399 So.2d 559 (La.1981); *Chappuis v. Sears Roebuck & Co.*, 358 So.2d 926 (La.1978); *Holland v. Buckley*, 305 So.2d 113 (La. 1974).

REVERSED AND REMANDED TO COURT OF APPEALS

* * * * * * * *

MARCUS, LEMMON, and BLANCHE, JJ., dissent and assign reasons.

MARCUS, Justice (dissenting).

I agree with the majority that the blood bank was not negligent. I disagree with the majority's conclusion that La.Civ.Code art. 1764(B)(1) is inapplicable in the instant case. The relationship between the blood bank and plaintiff is that of seller and purchaser. The warranty implied in every contract of sale as set forth in art. 1764(A)(2) would apply to the contract of sale here but for paragraph (B)(1) which states:

> Notwithstanding the provisions of Paragraph (A)(2) of this Article, the implied warranties of merchantability and fitness shall not be applicable to a contract for the sale of human blood, blood plasma or other human tissue or organs from a

> blood bank or reservoir of such other tissues or organs. Such blood, blood plasma or tissue or organs shall not for the purposes of this Article be considered commodities subject to sale or barter but shall be considered as medical services.

Where, as here, the legislature has limited the implied warranty of the thing sold, I do not think that the blood bank can be held liable in contract nor under principles of strict liability in tort. Hence, I agree with the holding of the district court, affirmed by the court of appeal, that a blood bank which distributed diseased blood without negligence cannot be held liable for damages caused by a person who contracts hepatitis after a transfusion because of its unwholesome condition.

Accordingly, I respectfully dissent.

BLANCHE, Justice (dissenting).

I respectfully dissent. The majority states that the words "unreasonably dangerous" were included within the definition of legal fault to prevent manufacturers from becoming insurers of their own products. Then it concludes that blood contaminated with undetected and undetectable hepatitis virus, notwithstanding the use of "state of the art" testing procedures, is unreasonably dangerous to normal use because the risk created when a person receives tainted blood is greater than the "reasonable consumer" would expect. The result of the holding is that health care providers must always provide wholesome blood regardless of their present scientific inability to do so, or pay damages for injuries caused by tainted blood. If this result does not make blood providers insurers of their product, this writer is hard pressed to discern how.

The legislature, apparently concerned with the inherent dangers in blood transfusions, has clearly stated that warranties of merchantability and fitness shall not be applicable to contracts for the sale of blood. C.C. art. 1764(B)(1). This statement, made at a time prior to this Court's "divining" of non-negligent fault theories from Civil Code Articles 2315-24, was clearly intended to prevent liability on the part of blood suppliers merely because transfused blood caused sickness, and was addressed to the only theory than considered available (until today) for the pursuit of such a claim. To draw a distinction now between "fitness" in contract and "unreasonable danger" in non-negligent fault tort for purposes of this action destroys the very meaning which the legislature sought to impose in the passage of Article 1764(B)(1).

Even assuming the inapplicability of Art. 1764(B)(1) to this case, plaintiff should not be entitled to recover on the basis of unreasonable danger in normal use.

The majority interprets the term "unreasonably dangerous" to mean that "the [specific] article which injured the plaintiff was dangerous to an extent beyond that which would be contemplated by an ordinary consumer." Such an approach places blood transfusions in the same category as shampoos, deodorants, candy bars, toasters, automobiles, oil changes and other everyday commodities and services about which a reasonable consumer can be expected to know something. It compares apples and oranges. Blood is necessary to the sustenance of life. The normal use of a blood transfusion is to preserve life. Without the ability to transfuse blood, the medical profession would be effectively prevented from all but the most minor surgical procedures. Unfortunately, at present, there is just no way that science can detect hepatitis virus in all blood units at all times. Thus, some people who receive blood transfusions will become ill with hepatitis. The only way to absolutely insure

against hepatitis infection from blood transfusions is to refrain from administering them. However, doctors, in light of their training and experience, must often recommend the performance of medical procedures which will require blood transfusions. Such decisions, made with the informed consent of patients, are based upon a balancing of the probability of reaching the desired medical effect and the possibility of harmful side effects. The risk of contracting hepatitis is but one chance a patient necessarily takes when he agrees to allow a blood transfusion. Thus, the expectations of a "reasonable consumer" concerning blood transfusions in general should be irrelevant.

* * * * * *

LEMMON, Justice, dissenting.

While I agree that the supplying of defective blood may give rise to a tort action based on fault, I disagree that the decision should be based on liability without fault.

The term "unreasonable risk of harm", as applied to the strict liability imposed by C.C. Art. 2317, is the key consideration in this case. The strict liability theory is that a person who has a thing under his control should be absolutely responsible for the damages caused by a defect in the thing, even though the person has no knowledge of the defect, when the defect creates an unreasonable risk of harm. In determining the reasonableness of the risk, a court must look to the benefits derived from the use of the thing and must weigh those benefits against the probability and degree of harm associated with the use.

In *Jones v. City of Baton Rouge*, 388 So.2d 737 (La.1980) this court held that a municipality was absolutely liable for a broken grate on a drainage opening in the street when a person fell through the grate and received injuries. However, in *Shipp v. City of Alexandria*, 392 So.2d 1078 (La.1980)

the court held that the city was not liable for a defective minor variation in the surface of the street, although a person without fault on her own part suffered an injury because of that defect, because the defect did not create a risk of harm which was unreasonable when compared to the benefits derived by the public from the government's furnishing of streets.

In the present case the hospital furnished blood to patients in need of a transfusion, and a certain percentage of that blood was contaminated with hepatitis, which at that time could only be detected with 20% accuracy. The degree of probability of hepatitis in the blood furnished to patients thus created a risk of harm to the patients, but that risk of harm must be weighed against the benefits to be derived from a blood transfusion. When all facts and circumstances are considered and properly weighed, I cannot conclude that the risk of harm is so unreasonable as to require imposition of absolute liability on the furnisher of blood.1/

It is entirely possible in this case that, *as a question of fact,* the supplier of blood was negligent in failing to warn plaintiff as soon as the supplier discovered that the blood donor's test for hepatitis was positive in his subsequent attempt to sell blood. But the supplier of blood should not be held strictly liable, *as a matter of law,* because the blood contained hepatitis when the supplier was unable to test effectively for this danger or to prevent its occurrence.

1/ Of course, this conclusion would not defeat a claim based on failure to obtain informed consent.

APPENDIX B

DOLORES FACIANE, WIFE OF/AND
JOSEPH C. DeBATTISTA

VERSUS

ARGONAUT-SOUTHWEST
INSURANCE COMPANY, ET AL

NO. 10596
COURT OF APPEAL
FOURTH CIRCUIT
STATE FO LOUISIANA

APPEAL FROM THE CIVIL DISTRICT COURT
THE PARISH OF ORLEANS
STATE OF LOUISIANA
HONORABLE HENRY J. ROBERTS, JR.
ON REMAND FROM LOUISIANA SUPREME COURT

MOTION AND ORDER FOR REMAND TO CIVL
DISTRICT COURT THE PARISH OF ORLEANS
STATE OF LOUISIANA
HONORABLE HENRY J. ROBERTS, JR.
ON REMAND FROM LOUISIANA SUPREME COURT

MOTION AND ORDER FOR REMAND TO CIVIL
DISTRICT COURT FOR DETERMINATION OF
QUANTUM AWARDS

TO THE HONORABLE COURT OF APPEALS,
FOURTH CIRCUIT:

MAY IT PLEASE THE COURT:

Now into court comes Plaintiffs-Appellants, Dolores

Faciane wife of/and Joseph DeBattista, through undersigned counsel, and with respect, moves this Honorable Court to remand this case to Civil District Court for an evidentiary hearing for an assessment of quantum inasmuch as there has been no determination of the question of damages by the trier of facts.

Where neither the trial court nor this intermediate appelate court reached the question of quantum of the damages to which the plaintiffs are entitled, since they dismissed the suit and affirmed, respectively, this case should be remanded for a full contradictory hearing for such purpose. *Capitol City Leasing Corp. v. Sidney Hill d/b/a Logging Contractor, et al.* _____So.2d____ (La. Supreme Court Docket No. 81-C-0538 c/w No. 81-C-0585, decided September 28, 1981): *Nelson v. Zurich Insurance Co.*, 247 La. 438, 172 So.2d 70 (1965).

Both trial and intermediate courts' opinions were addressed solely to the question of liability:

The Civil District Court, the Honorable Henry F. Roberts, Judge presiding, had dismissed the suit on March 23, 1978, with the following written reasons for judgment:

> "In dismissing the plaintiff's suit, this Court does not find that there is any implicit warranty in connection with the sale of blood. Said warranty this court believes is protected by specific statute.
>
> "This Court further believes that no evidence was adduced that convinces it there was negligence in preparation of the blood, the infusion of the blood or the storage of the blood."

This Court, the Honorable Jim Garrison, writing for the panel (which included Lawrence A. Chehardy and Edward J. Stoulia, Jr., JJ.) concluded his opinion affirming the trial court dismissal as follows:

> "• • • While this court may not necessarily agree with the written reasons of judgment rendered by the district court, we find that the judgment is not manifestly erroneous in its results. Hence, for the reasons discussed above, the judgment of the district court is affirmed."

The plaintiffs, movers herein, pleaded extensive damages in total amount of $287,000.00 however the trial record does not reflect consideration of any thing by the trial court except liability. *Jacobs v. New Orleans Public Service, Inc.*, 374 So.2d 167, writ granted 376 So.2d 321 (La. App., 4th Cir., 1979); *Guste v. Jackson*, 429 U.S. 399, 50 LEd.2d 638, 97 S.Ct. 657 (1977) *Placid Oil Company v. Taylor*, 306 So. 2d 664, on remand 313 So.2d writ granted 318 So.2d 40, on remand 325 So.2d 313, writ denied 329 So.2d 455 (1975).

Since the issues of damages raised in the original petition and answer have never been heard, and where Appellate Courts have the power to remand action for proper consideration when the record is so incomplete that the court is unable to pronounce definitely on issues presented, the ends of justice would best be met by remanding the case for a trial for such purpose. *Cousins v. Crest Air Conditioning and Heating Co., Inc.*, 305 So.2d 926, appeal after remand 332 So.2d 543, writ denied 337 So.2d 530 (La. App. 4th Cir., 1974); *Bodin v. Bodin*, 392 So.2d 759 (1980).

As Judge Samuel wrote for this Court in *Spriggins v. Broadmoor Esso Service Center*, 263 So.2d 365 (La. App. 4th Cir., 1972), that where "the evidence (on quantum) in the record on the part of both the plaintiffs and the defendant is minimal

or less and we are unable to reach proper quantum conclusions on the basis of that evidence. . . (we) remand the case (to district court) for further proceedings to determine the quantum awards to which the plaintiffs are entitled. . ." at 367.

FOR THE FOREGOING REASONS, the plaintiffs-Appellants request that the case be remanded to the Civil District Court for the parish of Orleans for further proceedings to determine quantum awards for damages.

/s/ Abbott J. Reeves, Esq.
Attorney for Plaintiffs,
Dolores Faciane, wife of/and
Joseph DeBattista,
419 Derbigny Street,
P. O. Box 465,
Gretna, La. 70054-0465
Telephone 367-1212

ORDER

CONSIDERING THE FOREGOING MOTION AND THE REASONS SET FORTH THEREIN, this case is remanded to Civil District Court for the Parish of Orleans for the sole purpose of holding an evidentiary hearing on the issue of damages to which the plaintiffs are entitled.

Signed in New Orleans, La. on this ___ day of _____, 1981.

_____

JUDGE

APPENDIX C

DOLORES FACIANE, WIFE OF/AND JOSEPH C. CeBATTISTA

VERSUS

ARGONAUT-SOUTHWEST INSURANCE COMPANY, ET AL

NO: 10,596
COURT OF APPEALS
FOURTH CIRCUIT
STATE OF LOUISIANA

APPEAL FROM THE CIVIL DISTRICT COURT
THE PARISH OF ORLEANS
STATE OF LOUISIANA
HONORABLE HENRY J. ROBERTS, JR.
NO. 566-288 "F"

ON REMAND FROM THE LOUISIANA SUPREME COURT
LOUISIANA SUPREME COURT DOCKET NO: 80-C-1772
(DECIDED JUNE 22, 1981; REHEARING DENIED SEPTEMBER !*, 1981)

ORIGINAL BRIEF ON REMAND ON BEHALF OF PLAINTIFF-APPELLANT DOLORES FACIANE, WIFE O/AND JOSEPH C. DeBATTISTA IN SUPPORT OF DAMAGES

ABBOTT J. REEVES, ESQ.
Attorney for Plaintiffs-Appellants
419 Derbigny Street
P.O. Box 465
Gretna, Louisiana 70054-0465
Telephone: (504) 367-1212

DOLORES FACIANE, WIFE OF/AND
JOSEPH C. DeBATTISTA

VERSUS

ARGONAUT-SOUTHWEST
INSURANCE COMPANY, ET AL
NO: 10596
COURT OF APPEALS
FOURTH CIRCUIT
STATE OF LOUISIANA

APPEAL FROM THE CIVIL DISTRICT COURT
THE PARISH OF ORLEANS
STATE OF LOUISIANA
HONORABLE HENRY J. ROBERTS, JR.
NO. 566-288 "F"

ON REMAND FROM THE LOUISIANA SUPREME COURT
LOUISIANA SUPREME COURT DOCKET NO: 80-C-1772
(DECIDED JUNE 22, 1981; REHEARING DENIED
SEPTEMBER 18, 1981)

ORIGINAL BRIEF ON REMAND ON BEHALF OF PLAINTIFF-APPELLANT DOLORES FACIANE, WIFE OF/ AND JOSEPH C. DeBATTISTA IN SUPPORT OF DAMAGES

TO THE HONORABLE COURT OF APPEALS, FOURTH CIRCUIT:

MAY IT PLEASE THE COURT:

INDEX

Page

A Syllabus (Statement of Principles of Law relied

upon with corresponding citations of authority 1

B. Concise Statement of The Case 11

C. The Action of the Trial Court, the Court of Appeals, and Louisiana Supreme Court 16

D. Note: There are no Specification of Errors (pursuant to Rule IX, Section 3) inasmuch as this case is on remand to evaluate damages only ...18

E. Issues Presented to this Court on Remand 21

F. Law and Argument 22

G. Conclusion 38

H. Certificate of Service 41

Table of authorities:

Anderson vs. Welding Testing Laboratory, 304 So.2d 351 (1974) 2

Bach vs. C. Swanton & Son, 286 P. 1097 6

Baloney vs. Dr. Warren K. Carte, East Jefferson Hospital et al, 387 So.2d 54 (La. App. 4th Cir., 1980) 1

Barrios v. Service Drayage Co., 250 So.2d 135 (La. App. 4th Cir., 1971) 19

Borde vs. Travelers Ins. Co., 281 So.2d 797 (La. App. 1973), 3rd Cir.) 8

Boseell v. Roy O. Martin Lumber Co., Inc., 363 So. 2d 506 (1978) 1

Broussard vs. Pierret, 215 So.2d 136 (La. App. 3rd Cir., 1968) 6

Chaplain v. Kinsella, 302 So.2d 52 (La. App. 4th Cir. 1974) 20

Coco v. Winston Industries, Inc., 341 So.2d 332 (1976) 18, 19

Crank vs. Fosty Second Street, M & St. M. Ave., R. G., 27 NE 856 6

Cunningham v. Bay Drilling Co., 421 F.2d 1398 (5th Cir., 1979) 20

DeBattista v. Argon Southwest Ins. Co., 385 So. 2d 518 (La. App., 4th Cir., 1980, Docket No. 10,596) Rehearing denied July 21, 1980 ..... 15, 16

DeBattista v. Southern Baptist Hospital & Argonaut Southwest Ins. Co. et al, (La. Supreme Court Docket No. 80-C-1772, decided June 22, 1981, rehearing denied Sept. 18, 1981) 11

Denver Transway Corp. vs. Gentry 256 P1088 6

Derouen v. Dept. of Transportation, 392 So.2d 765 (La. App. 3rd Cir., 1980) 18

Deville 258 So.2d 964 (1972) 6

Duncan vs. Smith, 376 SW 2d 877 6

Farr vs. Johnson, 308 So.2d 884 (La. App. 2d Cir., 1975) 2

Florida Greyhound Lines vs. Jones, 60 So. 2d 396 (1952) 7

Flowers vs. U.S. Fidelity & Guaranty Co., 381 So.2d 378 (1980) 7

Folse v. Fabouri, 371 So.2d 1120 (1979) 19

Gasquet vs. Commercial Union Ins. Co., 391 So.2d 466 (La. 4th Cir. 1980) 9, 9a, 19

Gele vs. Markey, 387 So.2d 1162 (1980) 2, 19

General Acc. Fire & Life Assur. Corp. v. Humble Oil Refining Co., 243 So.2d 865 (La. App. 1st Cir. 1971) 20

Gianakis v. Mayen, 301 So.2d 413 (La. App. 4th Cir. 1974) 19

Gobin vs. Kogel 375 So.2d 755, appeal after remand, 388 So. 2d 486 (La. App. 4th Cir., 1980) 9a

Harper v. O'Neal, 363 So. 2d 930 (La. App. 2nd. Cir., 1978) 20

Harris vs. Bardwell, 373 So.2d 777 (La. App. 4th Cir., 1979) 10

Hawkes v. Ayers, 537 F.2d 836 (5th Cir. 1976) 18

Hoffman vs. All Star Ins. Corp., 288 So. 2d 388, writ refused 290 So. 2d 909 (1974) 2

Humphries vs. Delta Fire & Casualty Co., 116 So.2d 130 (La. App. 1st Cir., 1959) 1, 4

Johnson vs. Creasor, 304/855 (La. App. 4th Cir., 1974) 6

Kay v. Home Indem. Co., 313 So. 2d 303 (La. App. 3rd Cir. 1975) 20

Kethledge vs. Petoskey, 140 NW 164 6

Konunsky v. Smith, 390 So. 2d 1377 (La. App. 3rd Cir. 1977) 18

Lalonde vs. Weaver, 360 So. 2d 542 (La. App. 4th Cir., 1978) 1, 19

Langerdorf v. Administrators of Tulane Ed. Fund, 361 E. 2d 905, writ denied 363 So. 2d 1384 (La. App. 4th Cir. 1978) 18

Lawson vs. Coca Cola Bottling Co. of Lake Charles, 287 So.2d 804 (La. App. 3rd Cir. 1973) 6, 7

LeBlanc vs. Metal Locking of La., Inc., 258 So. 2d 683 (La. App. 4th Cir., 1972) 9a, 19

Leideck vs. Chicago, 248 Ill. App. 545 6

Lestrick v. Najolia, 297 So2d 770 (La. App. 4th Cir., 1974) 18

Martin v. Southern Baptist Hospital 352 So. 2d 351 (La. App. 4th Cir., 1977 Writ denied 354 Es.2d 210) 14

McFarland vs. Illinois Central Railroad, 127 So. 2d 183 (1961) 9a

McKey vs. Dow Chemical Co., 295 So.2d 516 (La. App. 1st Cir., 1974) 7

meador vs. Toyota of Jefferson, Inc., 332 So. 2d 433 (1976) 4

Miller v. Thomas, 234 So. 2d 67, amended 246 So. 2d 16 (La. App. 4th Cir. 1970) 19, 22

Mischo vs. Von Dohren, 252 NW 830 6

Monk vs. Insurance Co. of North America 324 So. 2d 880, application denied 329 So. 2d 459 (La. App. 3rd Cir., 1976) 9

Murphy v. Georgia Pacific Corp., 628 F.2d 862 (5th Cir., 1980) .....,.20

Obediencia v. Liberty Mut. Ins. Co., 403 F.2d 654 (5th 1968) 18

Ordonez vs. Maryland Cas. Co., 312 So.2d 875 (La. App. 4th Cir., 1975) 9

Orfanello v. Pepsi Cola Bottling Co., 290 So.2d 353, writ denied, 293 So.2d 178 (La. App. 4th Cir. 1974) 19

Payton vs. Traveler Ins. Co., 373 So.2d 1324 (La. App. 4th 1979) 9a

Pernicaro v. Bruich, 384 So.2d 392 (1980) 19

Richard vs. Guillory, 392 So2d 777 (1980) 4, 19

Robinson vs. Granes, 343 So.2d 147 (1977) 9a

Routte v. Hargrove, 190 So.2d 319 (1974) 19

Rude v. Algiers, 105 N.W. 2d 825 (1960) 7

Seaboard Air Line R. Co. vs. Ford, 92 So. 2d 160 6

Smith vs. Travelers Indem. Co. of Rhode Island, 374 So. 2d 708 (La. App. 1st Cir., 1979) 18

Swisherv. Cutter (Ill,) Cook County Circuit Court, No. 76L16773 (April 15, 1979) 22

Viator vs. Gilbert, 216 So.2d 821 (1968) 9a

Walker vs. St. Paul Ins. Co., 339 So. 2d 441, on remand 343 So.2d 251, writ denied 345 So.2d 61 (1976) 1

Washington vs. Lake City Beverage, Inc., 352 So.2d 717, writ denied 354 So.2d 1050 (La. App. 3rd. Cir., 1978) 9

Wenis vs. Insurance Company of State of Pennsylvania, 128 So.2d 233 (La. App. 2d Cir., 1961) 9

Zesiger v. Sean, 247 So.2d 222 (La. App. 4th Cir. 1971) 20

LAW REVIEW ARTICLES

Title

Iowa Law Review, Rice, 55, 307 (1969) 10

An Analysis of the "Prima Facie Tort" Cause of Action, 42 Cornell L. Q. 465 (1957) 10

Translating Sympathy for Deceived Consumers Into Effective Programs for Protection, 114 U. Pa. L. Rev. 395, 403 (1966) 10

A. Syllabus

Statement of Principles of Law relied upon with corresponding citations of Authority.

I. GENERAL DAMAGES

"General damages" are those which may not be fixed with any degree of pecuniary exactitude but which involve mental or physical pain or suffering, inconvenience, loss of gratification or intellectual or physical enjoyment, or other losses of lifestyle which cannot be measured definitively in terms of money." *Boswell vs. Roy O. Martin Lumber Co., Inc.*, 363 So.2d 506 (1978).

1. PAIN AND SUFFERING

"Pain" is the photopathic sensation located in the nervous system. Recognition of the possible danger resulting from this sensation is "suffering," distinguished from the initial and continuing pain.

Plaintiff was entitled to award for his suffering and disability due to (Injury) . . . and depressive reaction, which incompassed a complete change in his life-style, making him withdrawn and suffering from a sense of general loss and hopelessness . . . *Lalonde vs. Weaver*, 360 So2d 542 (La. App. 4th Cir., 1978).

Factors to be considered in assessing quantum for pain and suffering are severity of injury and duration thereof. *Walker vs. St.*

Paul Ins. Co., 339 So.2d 441, on remand 343 So. 2d 251, writ denied 345 So.2d 61 (1976).

Pain, although unaccompanied by objective signs of injury, is compensable because it is damage to persons suffering such pain. *Baloney vs. Dr. Warren K. Carte, East Jefferson Hospital, et al*, 387 So.2d 54 (La. App. 4th Cir., 1980).

Recovering is allowable for pain, suffering and other effects resulting from neurosis precipitated or caused to become manifest by tort, just as it is for those produced by tort-caused physical injury or tort-produced aggravation or mainfestation of a formerly latent physical condition or predisposition. *Humphries vs. Delta Fire & Casualty Co.*, 116 So.2d 130 (La. App. 1st Cir., 1959).

2. MENTAL ANGUISH

Damages may be awarded for mental anguish and inconvenience . . . for acts giving use to strict liability. *Farr vs. Johnson*, 308 So2d 884 (La. App. 2d Cir., 1975).

Mental anguish is recoverable in tort actions. *Gele vs. Markey*, 387 So.2d 1162 (1980).

There are certain broad categories, which have received special consideration by the courts. These are:

(i) Fright and shock.
(ii) Anxiety about future injury, either physical or economic
(iii) Mental illness caused or precipitated by the injury

(iv) Humiliation, sense of insult or indignity, mortification or wounded pride.

(v) Loss of peace of mind and happiness

(iv) Loss of enjoyment of life

(i) Fright and shock

Fright, fear or mental anguish while an ordeal is in progress is legally compensable. *Hoffman vs. All Star Ins. Corp.*, 288 So.2d 388, writ refused 290 So.2d 909 (1974).

(ii) Anxiety about future injury, either physical or economic

Plaintiffs fear that hand condition resulting from radiation burns might spread was not non-compensable, although possibility of cancer and future progression was reasonably remote. *Anderson vs. Welding Testing Laboratory, Inc.*, 304 So.2d 351 (1974).

Chronic hepatitis is a very real possibility of victims of serum hepatitis. This leads to cirrhosis of the liver and could lead to canceroma. *Gastroenteric Magazine*, Nov. 1976, Vol. 71, No. 5, pp. 979–803.

Reinfection in viral hepatitis patients. vrach Delo Magazine, Oct. 1980, pp. 117–120.

Problems in management of hepatitis victims as carriers. Cecil's Textbook of Medicine, W. B. Saunders Company, 1979.

Goudeau, A., *Detection of Hepatitis B virus antigens in hepatocellular carcinoma tissues.* Progress in Medicine Virology Magazine, Vol. 27 (1980), pp. 77–87.

Tung, M. J., *Hepatitis B Viral Markers in Patients with Chronic Hepatitis and with Primary Hepatocellular Carcinoma.* Progress in Medicine Virology Magazine, Vol. 27 (1981), pp. 60-65.

Francis, D. O., *Feline Leukemia Virus and Hepatitis* r. Virus: A Comparison of Late Manifestations. Progress in Medicine Virology, Vol. 27 (1981), pp. 127–32.

Maupas, P., *Hepatitis B. Infection and Primary Liver Cancer.* Progress in Medicine Virology, Vol. 27 (1981), pp. 1–5.

Hepatitis B. Virus and Primary Hepatocellular Carcinoma. Progress in Medicine Virology, Vol. 27 (1981), p. 1–210.

Yarrish, R. L., *Association of Hepatitis B. Virus Infection with Hepatocellular Carcinoma in American Patients.* International Journal of Cancer, Vol. 26, pp. 711–715 (1980) December 15.

Wright, R. *Type B. Hepatitis: Progression to Chronic Hepatitis.* Clinical Gastroenterol Magazine, Vol. 9, pp. 97–115 (Jan. 1980).

Welsby, P. D., *How to Take Blood From Patients Who Have Hepatitis B.* B. R. Medical Journal, pp. 1052–3 (1981).

Hentzer, B. *Viral Hepatitis in A Venereal Clinic Population: Relation to Certain Risk Factors.* Scandinavian Journal of Infectious Diseases, Vol. 12, pp. 245–9 (1980).

Roch, R. D. *Post-Transfusion Hepatitis: Analysis of Risk Factors.* ACTA Haematol Magazine Vo. 11, pp. 159–64 (1980).

Hadziyannis, S. J., *Hepatocellular Carcinoma and Type B. Hepatitis.* Clinical Gastroenterol, Vol. 9 pp. 117–34 (1980).

Miron, C., *The Role of HBSAG in the Development of Chronic Liver Disease after Acute Liver Hepatitis.* Medical after Vol. 16, pp. 369–79 (Oct. - Dec. 1978).

Hepatocellular Carcinoma and Hepatitis B Virus Markers in Europe and USA. Lancet Magazine, 24 February 1979, pp. 433-4.

London, W. T., *Hepatocellular Carcinoma: An Approach to the Study of Risk Factors in Human Cancer.* RIC Clinical Lab Magazine, Vol. 8, pp. 232–6 (1978).

Post-transfusion Hepatitis Leading to Chronic Hepatitis Clinical Conference. Gastroenterology Magazine, Vol. 75, pp. 732–41 (1978).

(iii) Mental Illness cause by *or precipitated by the injury*

Damages for mental anguish, aggravation, distress and inconvenience are recoverable in an action sounding in tort. *Meador vs. Toyota*

of Jefferson, Inc., 332 So.2d 433 (1976).

Depression neurosis or emotional trauma caused by an accident is a compensable item of damage. *Richard vs. Guillory*, 392 So.2d 777 (1980).

A conversion neurosis is one in which the latent anxieties or tension or insecurities in a person's mental life are converted into physical symptoms of pain, suffering, and disability as real as if physically caused. *Humphries vs. Delta Fire & Casualty Co.*, 116 So. 2d 130 (La. App. 1st Cir., 1959).

Plaintiff in this case suffers from cancerphobia and syphilophobia. The cancerphobia is obvious where medical journals report it, and her moebid fear of syphillis is because the paid donor from whom the blood was drawn (that she got in transfusion) had syphillis. *See also*, 152 N.E. 2d 227.

(iv) Humiliation, sense of insult or indignity, mortification, or wounded pride.

Plaintiff in instant case felt such humiliation that she had to change churches and social circle of friends where she was treated "like a leper" when original church congregation had her placed in separate isolated pew and her original circle of life-long "friends" left her out of their society and did not answer social invitations. She felt ostracized, clearly because of their fear of contacting hepatitis, including popular misunderstanding of role of

a hepatitis carrier.

She was not invited to Christmas or New year parties, Mardi Gras balls, weddings or christenings.

Plaintiff in instant case has constantly felt "unclean" and "undesired" by her husband where donor of transfused contaminated blood had history of syphillis.

(v) Loss of peace of mind and happiness

(vi) Loss of emjoyment of life

Plaintiff in instant case had feeling of "utter hopelessness" and was unable to care for her husband and child in routine daily household matters, e. g. cleaning, cooking, personal "touching" affection, school activities, and by not being able to contribute to family income.

Further, plaintiff lost weight in excess, which detracted from otherwise feeling of confidence and good looks, including loss of hair (which was due to lack of estrogen, improper therapy and loss of nutrition). Her skin was jaundiced and she has never regained original coloring and eyes were also discolored.

3.AGGRAVATION OF PRE-EXISTING INJURY

A tortfeasor takes his victim as he finds him. *Deville* 258 So.2d 694 (1972). *Johnson vs. Creasor,* 304/855 (La. App. 4th Cir., 1974).

Although instant plaintiff went to Ochsner Foundation Hospital to undertake correction and minimize injury and losses, nevertherless her situation was aggravated and danages actually increased. *See, Broussard vs. Pierret,* 215 So.2d 136 (La. App. 3rd Cir., 1968).

Instant plaintiff's concurrent surgery for hysterectomy necessitated post-op treatment on hormones which were stopped due to contracting hepatitis resulting in shock. It is called "instant menopause."

Important element of instant case was that defendant's hospital deliberately withheld information to plaintiff that she was given contaminated blood for over 6 weeks time period, thus further aggravating her injury. *See also,* 100 ALR 2d 808, 811. (This malice is also grounds for exemplary damages.)

4. INCREASED SUSCEPTIBILITY AS A PERMANENT INJURY, PERMANENT INJURY AND INFERENCE OF PERMANENCE FROM PERSISTING SYMPTOMS

The principle of permanent injury is not limited to physical functions. The impairment of a mental function is also compensable. Examples: "sleeplessness", *Denver Transway Corp. vs. Gentry,* 256 P 1099; "sensitivity to certain chemicals," Seaboard Air Line R. Co. vs. Ford, 92 So.2d 160; "occasional crying spells," *Mischo vs. Von Dohren,* 252 NW830; "continued nervousness after injury," *Kethledge vs. Petoskey,* 146 NW 164; "inability to work, tiring easily," *Bach vs. C. Swanton & Son,* 286 P 1097; "increased susceptibility to cancer," *Duncan vs. Smith,* 376 SW 2d 877; "inevitability to complicated any future illness," *Crank vs. Fosty Second Street, M + St. N. Ave., R. G.,* 17NE 856; "nervousness and irritability," *Leideck vs. Chicago,* 248 Ill. App. 545.

5. NAUSEA AND VOMITING

Recovery can be had for psychogenic symptoms, such as nausea and vomiting. *Lawson vs. Coca Cola Bottling Company of Lake Charles*, 287 So.2d 804 (La. App. 3rd Cir., 1973).

6. LOSS OF HAIR

Plaintiff experienced a considerable loss of hair, which damage was for the court to see in plain view.

7. PHYSICAL INJURY

Plaintiff suffered repeated needle injections for blood test and intravenous feeding. Her arms were like "pin cushions" and hurt extensively.

8. DISCOMFORT FROM ITCHING AND IRRITATION

Itching and irritation (while not a permanent injury) can be considered an element of damages for compensation. (*Rude vs. Algiers*, 105 N.W.2d 825 (1960).

9. VALUE OF HOUSEWIFE SERVICES

Housewife is entitled to compensation for diminished earnings capacity. The capability of a housewife that has been destroyed or impaired by the negligent act of another may not be ignored in assaying the damage, simply because she had not gathered money in some other activity. *Florida Greyhound Lines vs. Jones*, 60 So. 2d 396 (1952).

10. LOSS OF CONSORTIUM

(a) Wife, individually, suffered loss of ability, to have sexual relations with husband, which item is compensable as an item of damage. *Compare McKey vs. Dow Chemical*

Co., 295 So.2d 516 (La. App. 1st Cir., 1974).

(b) A wife's action for damages arising from offenses and quasi offenses are her seperate property and are recoverable by her alone. C. C. arts. 2334, 2402 (Repealed). *Flowers vs. U.S. Fidelity & Guaranty Co.*, 381 So.2d 378 (1980).

11. HUSBAND'S ADDITIONAL PECUNIARY LOSSES

(a) Loss of wife's contributions to household from her own earnings

(b) Expense of employing a housekeeper or servant to perform services, which wife had rendered gratuitously.

(c) Expense of providing board and lodging for such housekeeper.

(d) Addition expensed caused by having household run by housekeeper or servant instead of wife.

(e) Expense of having own clothes, etc., mended instead of having them cared for and mended by wife.

(f) Having to eat meals out instead of having them cooked by wife at home.

(g) Loss of element of security where husband's employment was insecure (he is an amputee), and where wife had been accustomed to go out to work to keep the home going when husband was not working.

(h) Loss of contribution to wife's pension.

(i) Alienation of affection of wife because of injury - - see change in personality of wife.

12. FEAR OF FUTURE DISABILITY

13. FEAR OF FUTURE ILLNESS

14. FEAR OF ECONOMIC LOSS

15. FEAR FOR SAFETY OF HER HUSBAND AND CHILD ("ZONE OF PERIL")

II. SPECIAL DAMAGES

1. PAST MEDICAL EXPENSES

Borde vs. Travelers Ins. Co., 281 So.2d 979 (La. App. 1973, 3rd Cir.)

Claim of husband for special damages for hospital and medical expenses incurred in treatment of wife's injuries need not be rejected because he did not testify where the wife did testify without contradiction, establishing a prima facie case. *Wents vs. Insurance Company of State of Pennsylvania*, 128 So.2d 233 (La. App. 2d Cir., 1961).

Husband, whose wife was injured due to negligence of another, was entitled to recover medical expenses incurred for treatment of her injuries and to recover for loss of wages sustained by wife as a result of her disability. *Monk vs. Insurance Co. of North America*, 324 So.2d 880, application denied 329 So.2d 459 (La. App. 3rd Cir., 1976).

Medical expenses were admitted in instant case and by stipulation, that is, suffice to prove that item of damage. *Ordonez vs. Maryland Cas. Co.*, 312 So.2d 875 (La. App. 4th Cir., 1975).

2. FUTURE MEDICAL EXPENSES

Gasquet vs. Commercial Union Ins. Co., 391 So.2d 466 (La. App. 4th Cir. 1980).

3.LOST TIME AND EARNINGS

Wife, rather than her husband, possessed right to enforce an action to collect her lost wages which occured as result of automobile accident. LSA C. C. P. Art. 686. *Washington vs. Lake City Beverage, Inc.*, 352 So.2d 717, writ denied 354 So.2d 1050 (La. App. 3rd Cir., 1978).

> One element of damages from "permanent partial disability" from an accident is loss of earnings attributable to that disability. *Gobin vs. Kogel*, 375 So.2d 755, appeal after remand, 388 So.2d 486 (La. App. 4th Cir., 1980). See also *Payton vs. Travelers Ins. Co.*, 373 So. 2d 1324 (La. App. 4th 1979).

4.LOSS OF FUTURE INCOME

> Loss of future income is a recoverable element of damages fesulting from tortions conduct. *LeBlanc vs. Metal Locking of Louisiana, Inc.*, 258 So. 2d 683 (La. App. 4th Cir., 1972).
>
> Asscertaining of loss of future earnings is by computation based solely upon work-life expectancy, *McFarland vs. Illinois Central Railroad*, 127 So.2d 183 (1961).
>
> * * * Consideration must be given to the settled jurisprudence of this Court that allowance of monetary damages for loss of future earnings (or support of dependants in case of death) cannot be calculated with mathematical

exactitude; that they are speculative in character and the' * * * most that the courts can do * * * is to exercise a sound judicial discretion and award such amount as, all the circumstances considered, may seem just to both litigants and not unduly oppressive to either' *Viator vs. Gilbert*, 216 So.2d 821 (1968).

Future loss of earnings cannot be calculated with absolute certainty; damages for loss of future earnings are somewhat speculative in character. *Robinson vs. Granes*, 343 So.2d 147 (1977).

"* * * An award can be made for loss of future earnings where it appears with reasonable certainty that there will be such a loss." *Gasquet vs. Commercial Union Insurance Co.*, 391 So.2d 466 (La. App. 4th Cir., 1980).

"* * * Where loss of future earnings cannot be proven with mathematical certainty, court court can nevertheless make an award for such earnings where there is such proof as reasonably establishes the claim." *Gasquet vs. Commercial Union Ins. Co.*, 391 So.2d 466 (La. App. 4th Cir. 1980).

III. PUNITIVE DAMAGES IN INSTANT STRICT LIABILITY CASE ALLOWABLE

(a) Compensate plaintiff for injured feelings, mental distress and vexation.

(b) Punish defendants for injury to plaintiff.

(c) Punish and deter defendants and deter

other potential wrongdoers for injuries to society caused by flagrant abuse of accepted norms.

The unconscionable practice of deliberately injecting contaminated blood into the unsuspection consumer-patient, which the Louisiana Supreme Court has held results in strict liability of defendant should provide for exemplary damages. *See* Rice, 55 *Iowa Law Review*, 307 (1969), and generally, Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 Cornell L. Q. 465 (1957); and Comment, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection*, 114 U. Pa. L. Rev. 395, 403 (1966).

There is no evidence that the Louisiana Legislature meant to establish a deterrent more formidable than compensatory damages in medical malpractice and tort cases, especially where the Louisiana Supreme Court held the instant defendants strictly liable indicating malicious intention to deprive plaintiff of her rights or to do her other injury.

IV. ATTORNEY'S FEES

For acts giving use to strict liability, *Harris vs. Bardwell*, 373 So.2d 777 (La. App. 4th Cir., 1979).

B. Concise Statement of the Case

Plaintiff-Appellant Mrs. Dolores DeBattista, at age 38, entered Southern Baptist Hospital for surgery, specifically a hysterectomy January 28, 1973. During her initial stay at

the hospital, she received blood transfusions. The Louisiana Supreme Court found these blood transfusions as the direct cause for her contracting viral hepatitis and held that blood is an inherently dangerous substance and found the Southern Baptist Hospital strictly liable. *DeBattista v. Southern Baptist Hospital and Argonaut-Southwest Insurance Co. et* al. (Louisiana Supreme Court Docket No. 80-C-1772, decided June 22, 1981, rehearing denied September 18, 1981). The case was remanded to this appellate court "because the defendants prevailed in both lower courts, (and) no assessment of the plaintiffs' damages has been made.. ."

The original petition filed on January 3, 1974, sued for a total of $287,000.00 itemized as follows:

Dolores Faciane, wife of Joseph DeBattista

A.	Physical pain and suffering, past, present and future	$25,000.00
B.	Mental anguish and distress, past, present and future	$25,000.00
C.	Permanent impairment of physical functions past, present and future	$50,000.00
D.	Past, present and future income loss	$75,000.00
	TOTAL	$175,000.00

Joseph DeBattista, her husband, as head and master of the community

A.	Medical bill, past, present and future, not including hospital	$5,000.00

B.	Hospital expenses, past, present, and future	$5,000.00
C.	Drug expense, past, present and future	$2,000.00
D.	Mental anguish and distress, past, present and future	$10,000.00
E.	Loss of services of wife	$15,000.00
F.	Past, present and future loss of wife's income	$75,000.00
Sub-total		$112,000.00
Plus interest from date of judicial demand		
	Grand total	$287,000.00

The trial on liability was held January 26, 1977.1/ The trial court judgment was rendered, with written reasons on March 23, 1978. The Court of Appeals for the Fourth Circuit, with the Honorable Jim Garrison, writing for the panel (which included Lawrence A. Chehardy and Edward A. Stoulig, Jr.) affirmed the trial court dismissal of the suit. No. where, in either judgment, did either court address quantum of award for damages.

1/ The transcript is entitled, "Testimony and Notes of Evidence taken before the Honorable Henry J. Roberts, Jr., Judge presiding." Because plaintiff's counsel, the late Charles R. Maloney, Esq., died before it could be confirmed whether or not the trial was Part 1 of a bifurcated hearing (on liability first and damages second) and because Judge Roberts has said he doesn't remember, because of the time lapse, and having destroyed his own notes since this court affirmed his judgment, counsel presumed that based on the record, and particularly the trial court judgment, only liability was considered. Further, defendant did not introduce one iota of evidence to refute plaintiff's or her husband's alleged damages.

STATEMENT OF FACTS

The blood bank at Southern Baptist Hospital paid donor Watson (who had a history of hepatitis, syphillis, and schizophrenia) for contaminated blood that was administered to the unuspecting Mrs. Dolores DeBattista. No consent was secured by the defendants to administer the blood transfusion. As a direct result of the transfusion of the "bad" blood, defendant suffered from serum (viral) hepatitis and this triggered extensive other damages.

Direct examination of the victim, Mrs. Dolores DeBattista (at Vol. 2, p. 36) testified to having severe headaches, nausea, throwing up, exhausion, tired feeling, my arms and legs were extremely weak. I started turning yellow, even my eyes were yellow. I was having trouble with lights, I couldn't stand the electric lights or even daylight coming through the curtain made me want to faint. I started itching. I can't describe the itching, it was all over, and I was scratched raw. I lost weight. My normal weight was between 121 and 123 and I dropped down to 106. I was depressed. I cried. I was extremely nervous and I couldn't do anything. I stayed in bed for that period of time there. I couldn't keep water down and I was just sick. . ."

And, at Vol. 2, p. 56:

"Q As of this time, Mrs. DeBattista, what difficulties are you having, what difficulties are you having now?"
"A Still have headaches. I still tire very easily. I'm still spitting up after I eat, like bile, but not to the extent I was. I am still nervous, but not to the extent I was. I can't handle situations that I used to be able to handle. . ."

And, more, at Vol. 2, p. 48, she testified of receiving medication for a kidney problem resulting from the hepatitis.

In fact, plaintiff was not advised that the diagnosis of her

ailment was hepatitis until April 16, 1973. Yet, while the blood bank knew that Watson's blood, given to Mrs. DeBattista was contaminated on or about March 15, 1973 -- one month earlier, they never notified her or otherwise tried to alleviate her pain and suffering.

In addition, the hospital maintaining a "conspiracy of silence" even denied that they had a Dr. R. Henry on their staff (see Exhibit 1) who was later (through plaintiff's diligent investigation) found to have, in fact, treated her all the while Dr. Henry was recovering from a case of hepatitis himself.

The donor, in this case, made two donations. The first on January 26, 1973. This blood specimen passed all tests as good blood even though in fact it was the blood that eventually proved to be *bad blood* resulting in plaintiff's contracting hepatitis. Then, the same donor returned on March 26, 1973 to make a second donation. At this time his blood showed positive to serum hepatitis. Even with this information, the blood bank did not notify the victim, Mrs. BeBattista, that this same donor had been the paid source of her original transfusion which subsequently resulted in her illness.

Mr. DeBattista had suffered not only from the physical injury to her liver and the consequential effects, but also from a severe case of conversion anxiety. As was brought out on the trial on January 26, 1977, Mrs. DeBattista's sister, Joyce Martin (*Martin v. Southern Baptist Hospital*, 352 So. 2d 351 (La. App. 4th Cir., 1977, writ denied 354 Es. 2d 210) had earlier suffered a similar case of hepatitis contracted in the same hospital. (See transcript Vol. 2 p. 24, 25).

She also suffered more intensely seeing her sister before her develop a case of chronic hepatitis and even to this day Mrs. DeBattista fears consequences of Southern Baptist's

injection into her body could lead to cancer.

A part of the trial transcript is the deposition of Dr. Lloyd C. Eyrich who treated Mrs. DeBattista and whose testimony corroborates findings of her complaints and suffering.

Also part of the trial record, stipulated by both parties are the hospital records - - from both Southern Baptist Hospital and Ochsner Hospital (where Mrs. DeBattista went later to try to mitigate the injury). See aslo stipulations admitting all medical bills (Vol. 2, p. 62).

It is of special note that one most important itme of damage was proffered but was never considered by the trial court. Plaintiff's Proffer No. 1, (*See* Vol. 2, p. 133).

Mrs. DeBattista testified she is married to Joseph DeBattista. (Vol. 2, p. 14).

This court found Mrs. DeBattista is still an outpatient at Oschner Clinic. *DeBattista v. Argonant-Southwest Ins. Co.*, 385 Ea 2D 518 at 521 top of page, right hand column, line 3.

C. The Action of the Trial Court, The Court of Appeals, and Louisiana Supreme Court

The trial court held a hearing on January 26, 1977. It appears to have been solely on the issue of liability (*See* footnote No. 1 *supra*). A judgment with written reasons dismissing the lawsuit was rendered by Judge Roberts on March 23, 1978 to wit:

> "In dismissing the plaintiff's suit, this Court does not find that there is any implicit warran-

ty in connection with the sale of blood. Said warrenty this court believes is protected by specific statute.

"This Court further believes that no evidence was adduced that convinces it there was negligence in preparation of the blood, the infusion of the blood or the storage of the blood."

The Court of Appeals for the Fourth Circuit affirmed the judgment on May 13, 1980. *DeBattista v. Argonaut-Southwest Insurance Co.*, 385 5022d 518 (La. App. 4th Cir., 1980, Docket No. 10,596). Rehearing denied July 21, 1980.

This Court, the Honorable Jim Garrison, writing for the panel (which includes Lawrence A. Chedardy and Edward J. Stoulig Jr., JJ.) concluded his opinion affirming the trial court dismissal as follows:

"• • • While this court may not necessarily agree with the written reasons of judgment rendered by the district court, we find that the judgment is not manifestly erroneous in its results. Hence, for the reasons discussed above, the judgment of the district court is affirmed."

Writ Application was made to the Louisiana Supreme Court on August 4, 1980. The Louisiana Supreme Court granted writs and an opinion was rendered June 22, 1980, finding "that blood contaminated with hepatitis virus is defective, i. e., unreasonably dangerous to normal use." (See p. 10, line 16 of photocopy of La. Supreme Court opinion) and "that plaintiffs proved (a) that the blood which Mrs. DeBattista received by transfusion was defective, i. e., unreasonably dangerous to normal use, (b) that it was a

product which had been processed and distributed by the defendant blood bank, (c) that Mrs. DeBattista's injury might reasonably have been anticipated by one having actual or constructive knowledge of the defect, and (d) that Mrs. DeBattista's injuries were caused by reason of the defect. The defendants did not present any proof that the damage was caused by the fault of the plaintiffs. The blood bank, therefore, is liable of the plaintiffs." (Pages 10 and 11, photocopy of La. Supreme Court opinion dated June 22, 1981.). Finally, the Louisiana Supreme Court held that the "liability is not one governed by the law of contractual warranties but by the law of strict liability in tort." (Page 12, line 14, photocopy of La. Supreme Court opinion).

The case was reversed and remanded "Because the defendants prevailed in both lower courts, (and) no assessment of the plaintiffs' damages has been made."

D. Note: There are no Specification of Errors (pursuant to Rule IX, Section 3) inasmuch as this case is on remand to evaluate damages only

In the event this Court does not remand this case to the Civil District Court for a full hearing on the issue of damages (Cf. *Hawkes v. Ayers*, 537 F.2d 836 (5th Circuit 1976) and *Obediencia v. Liberty Mut. Ins. Co.*, 403 F.2d 654 (5th 1968), the plaintiff appellant submits the following instructions for consideration by this court in making its determination of a quantum award of damages to which the plaintiffs are entitled:

The plaintiff reiterates the list of damages presented in this instant brief, in the *Syllabus supra*, as though reproduced in its entirety herein, as instructions to the court to be considered in making an evaluation of quantum for damages suffered.

In addition hereto, the plaintiff-appellant submits the following:

1. Basic theory of separation is that the damaged party should be returned as nearly as possible to his condition prior to the act which caused the damage. *Langerdorf v. Administrators of Tulane Ed. Fund.*, 361 E.2d 905, writ den. 363 So2d 1384 (La. App. 4th Cir., 1978).

2. There is no error in awarding these damages *in globo*. *Smith v. Travelers Indem. Co. of Rhode Island*, 374 So2d 708 (La. App. ist Cir., 1979).

3. Realistically, in quantum issues, as in other issues, there must necessarily be a degree of uncertainty in predicting ultimate result in each case. Civil Code Article 1934, Subd. 3; *Coco v. Winston Industries, Inc.*, 341 So.2d 332 (1976).

4. Where there is a legal right to recovery but damages cannot be exactly estimated, courts have reasonable discretion to assess damages based on all the facts and circumstances of the case. *Derouen v. Dept. of Transportation*, 392 So2d 765 (La. App. 3rd Cir., 1980).

5. Where it is clear that plaintiff has sustained some damages as a result of fault of defendant, his demands will not be rejected merely because he could not establish exactly the amount of damages suffered. Civil Code Article 2315. *Konunsky v. Smith*, 390 So2d

1377 (La. App. 3rd Cir., 1977). *Lestrick v. Najolia*, 297 So2d 770 (La. App. 4th Cir., 1974).

6. Award for pain and suffering is imprecise and is not subject to irrefutable mathematical rules. *Gianakis v. Mayen*, 301 So 2d 413 (La. App. 4th Cir., 1974; *Routte v. Hargrove*, 190 So2d 319 (1974).

7. Plaintiff is entitled to an award for her suffering and disability due to her conversion reaction and depressive reaction which encompassed a complete change of her life-style, making her become withdrawn and suffering from a sense of general loss and hopelessness. *Lalonde v. Weaver*, 360 So2d 542 (La. App., 4th Cir., 1978).

8. Defendant takes his victim as he finds him and is responsible for all natural and probable consequences of his tortious act. *pernicaro v. Pruich*, 384 So2d 392 (1980).

9. Loss of future income is a recoverable element of damages resulting from tortious conduct *LeBlanc v. Metal Locking of La.*, 258 So.2d 683 (La. App. 4th Cir., 1972).

10. An award can be made for loss of future earnings and loss of earning capacity where it appears with reasonable certainty that there will be such a loss. *Gasquet v. Commercial Union Insurance Co.*, 391 So. 2d 466 (La. App. 4th Cir. 1980); *Folse v. Fabouri*, 371 So 2d 1120 (1979); *Coco v. Winston Industries, 341 So.2d 332 (1976).*

11. Future earning capacity may be used as one of the elements worthy of consideration in assessing damages. *Barrois v. Service Drayage Co.*, 250 So.2d 135 (La. App. 4th Cir., 1971).

12. Future medical expenses are in item of damages. *Richard v. Guillory*, 392 So. 2d 777 (La. App. 3rd Cir., 1980).

13. Depression neurosis or emotional trauma are a compensable item of damage. *Richard v. Guillory*, 392 So. 2d 777 (La. App. 3rd Cir., 1980).

14. Damages for mental anguish are recoverable in tort actions. *Gele v. Markey*, 387 So. 2d 1162 (1980).

15. Whether feeling of being "unclean" or "tainted" because of receiving contaminated blood from syphillic and schizophrenic donor were magnified in plaintiff's mind, it was an injury that produced mental anguish and is compensable. *See Orfanello v. Pepsi Cola Bottling Co.*, 290 So.2d 353, writ denied 293 So.2d 178 (La. App. 4th Cir. 1974) for comparison. *See also, Miller v. Thomas*, 234 So.2d 67, amended 246 So.2d 16 (La. App. 4th Cir., 1970).

16. Exemplary damages are damages on increased scale, over and above what would barely compensate for proper loss, where wrong was aggravated by circumstances of violence, oppression, malice, or fraud and are intended to solace offended for mental

anguish, shame degradation or other aggravation of original wrong. *General Acc. Fire & Life Assur. Corp. v. Humble Oil & Refining Co.*, 243 So. 2d 865 (La. App. 1st Cir., 1971).

17. The court shall award interest in the judgment as prayed for or as provided by law. CCP Act 1921.

18. Legal interest shall attach from the date of judicial demand, on all judgments, sounding in damages, "ex delicto," which may be rendered by any of the courts. R. S. 13: 4203; Civil Code Acts 1938 and 2924.

19. It is not necessary that documentary evidence be introduced to support claim for damages, *Harper v. O'Neal*, 363 So. 2d 930 (La. App. 2d Cir., 1978).

20. Proof of damages may be made by direct or circumstantial evidence. *Kay v. Home Indem. Co.*, 313 So. 2d 303 (La. App. 3rd Cir., 1975); *Chaplain v. Kinsella*, 302 So.2d 52 (La. App. 4th Cir., 1974).

21. In cases where, although there is a legal right of recovery, an exact estimate of damages cannot be made, the courts nevertheless have discretion to assess damages based on all the facts and circumstances. *Zesiger v. Sean*, 247 So. 2d 222 (La. App. 4th Cir., 1971).

22. Instruction which refers to decreased purchasing power of dollar is not improper. *Cunningham v. Bay Drilling Co.*, 421 F.2d

1398 (5th Cir., 1970).

23. Under Louisiana Law, jury could consider decreasing purchasing power of dollar in determining damages. *Murphy v. Georgia Pacific Corp.*, 628 F.2d 862 (5th Cir., 1980).

F. Issues Presented to this Court on Remand

Determination of quantum of award for damages to which plaintiffs Mrs. DeBattista and Mr. Joseph DeBattista are entitled.

In the alternative, whether or not to remand the case to the trial court for a full hearing on damages.

F. Law and Argument

This is a case of first impression in Louisiana courts, apparently not previously been construed by any court with respect to damages. While there have been numerous lawsuits for damages from post-transfusion viral hepatitis, none got by the liability stage. Consequently, the courts have never had to make a determination for quantum of awards for damages of a victim of such an injury. Similarly, despite research in the national reporters of other states for awards comparative damages, counsel found the pickings most sparse. Admittedly, awards in other cases can only serve as an aid in determining the instant award. *Miller v. Thomas*, 258 La. 285, 246 So. 2d 16 (1971).

In addition to counsel's examination of cases from other states, professional evaluation was received from Jury Verdict Research, Inc., (*See* Exhibit 3, injury evaluation report of instant case which found a probable verdict amount of $225,000 for Mrs. DeBattista and $35,000 for Mr. DeBattista.) The Medical Malpractice Exchange of The Association

of Trial Lawyers of America uncovered a settlement for $180,000 (*Swisher v. Cutter* (Ill.) Cook County Circuit Court, No. 761 16773 (April 15, 1979); WESTLAW (computerized legal research) and MEDLINE (computerized index to medical literature for the last 15 years, produced by the National Library of Medicine).

Secondly, inasmuch as the defendant's damage (injection of the disease viral hepatitis serum B) to the plaintiff, Mrs. Dolores DeBattista, was initially to her liver, which subsequently triggered subsequent damages, counsel submits a brief "white paper" on how the liver rules our lives so that this court may better understand the seriousness of the injury inflicted.

After the skin, the liver is the next largest organ of the human body, and, next to the brain, perhaps the most versatile. It acts as the body's master laboratory, filtering out undesirable substances, neutralizing waste materials, manufacturing organic compounds, storing nutrients and releasing them to the bloodstream when the body needs them. It has about 500 recognized functions.

In its role as a gland, the liver manufactures and secretes bile for digestion and stores it in the gallbladder. When food reaches the acid-laden stomach, the liver and pancrease receive a signal. By the time food reaches the first part of the small intestine, the duodenum, the liver has signaled the gallbladder to release the necessary bile. The bile joins the equally alkaline pancreatic juice and intestinal fluids. Together, they tear into acid-saturated foods and break them down into their components, preparing them for utilization by the body.

As the food is broken down, the sugars rush ahead from the intestine into the liver via the bloodstream. Aside from the leftover fats that are sent throughout the body by the

lymphatic vessels, everything else proceeds to the liver for the inspection and processing of food particles, fatty acids and glycerol. At this juncture, after the digestive process has reduced the ingested food to a rubble, the liver makes sense out of it by assimilating it into compounds which the human body can use.

In order to perform its myriad number of chemical functions, including many that science has never been able to duplicate, the liver makes its own enzymes which act as catalysts. The enzymes that the liver produces are organic catalysts that provide an encouraging atmosphere enabling organic substances to rapidly change their structural make-up.

Because of the incredible speed with which the liver can produce these catalytic enzymes, it is ready to work on the amino acids and sugars as soon as they arrive after racing through the capillaries from the intestine, entering the liver through the great protal vein. The liver rearranges these amino acids into new and usable proteins.

When the skin is broke, the liver is called upon to control the bleeding by clotting. To do this, it manufactures the coagulant prothrombin. It also helps in preventing the dangerous thickening of the blood in the arteries by manufacturing two anticoagulants, heparin and antithrombin.

When the muscles call for energy, which is often the case after exercising, the liver taps its supply of glycogen, converting glucose and releasing it into the bloodstream. When the muscles, in turn, throw off poisonous lactic acid, the liver draws it back and reconverts it to glycogen.

Even when the body's red blood cells have served their purpose and died, they are salvaged in part by the liver - - at the rate of approximately ten million per second. The

liver does this by sending them first to the spleen, which breaks them down into their components, and then using the raw materials for building new blood cells and other body components.

However, the liver cannot use everything that is sent its way. What the body doesn't need, such as waste nitrogen, is turned into urea and sent to the kidneys for elimination. The liver is also instrumental in regulating the balance of salt and water in the body by building amino acids into albumin; it balances the sex hormones to keep the sexual urge from increasing or decreasing; and it destroys excess thyroxin that would throw the growth processes out of control.

As blood passes through the liver on its way toward the heart and the rest of the body, it picks up nutrients and vitamins that the liver stores - - vitamins A, D. the B complex and such minerals as zinc, iron and copper. And, of course, the liver has the job of removing toxic substances from the blood before sending it on, which means eliminating poisons from such substances as alcohol, nicotene, caffeine, drugs, industrial poisons, sprays and solvents.

If is sounds like a great deal of blood passing through the human liver, it is. The liver in the average human weighs approximately five to eight pounds and is capable of containing at any one moment a quarter of the body's blood - - only the lungs receive more blood than the liver.

The liver receives fresh arterial blood from the heart via the capillaries and then sends it back to the heart through the veins. It also receives venous blood, which must be cleaned before it can safely go any further. The liver also serves as an internal sentry for the heart. It catches any unanticipated amount of excess blood before it can flood the heart and perhaps interfere with the pumping action of that organ. The liver can do this because it can stretch

large enough to hold any excess blood, BUT NOT IF IT IS DISEASED. It then releases this excess accumulation of blood in a steady stream that will not overtax the heart.

The human body cannot do without the liver's operations even for an instant. If any part of the liver malfunctions, the chances are that it will remain undetected until the condition becomes quite serious.

The most common types of liver diseases are cirrhosis and viral hepatitis. Cirrhosis of the liver occurs when the liver cells gradually stop functioning and are replaced by hard fibrous tissues while the organ itself shrinks. In cases of viral hepatitis, which may be infectious, or serum hepatitis, the liver becomes inflamed.

1. Pain and Sufferi[illegible]

The trial record is replete with incidents of pain and suffering. Not only the transcript is to be considered, particularly the testimony of Mrs. DeBattista, Vol. 2, pages 36 et seq and 56 et seq., but the hospital records themselves.

The hospital records also include complaints by the plaintiff in the hospital and nurses notes and doctors notes revealing pain suffered and medicines and treatment prescribed. See copies of medical record attached hereto of plaintiff during stay at Southern Baptist Hospital, starting with her admission on April 18, 1973.

Her skin was jaundiced and suffered anorexia. (Page 3 of Medical Record). She was diagnosed as having viral hepatitis (Page 3, *supra*).

These notes were made by Dr. Byrich whose deposition was also made a part of the trial record. Her chief complaint was nausea and vomiting (pages 5 & 7, Medical Record). The nausea started approximately 7 to 10 days prior to admission

to the hospital. Her skin looked icteric. The plaintiff complained of "dry heaves" (page 8, Medical Record).

Despite her recent surgery for a total hysterectomy, plaintiff was denied post-op treatment of estrogen (hormone therapy). This denial of necessary estrogen replacement resulted in shock to plaintiff's body. In effect, plaintiff had "instant menopause." Hormones are detrimental to diseased liver.

Dr. Eyrich prescribed preduisone (steroids) in an attempt to control plaintiff's acute condition. Dr. McCaffery consulted with Dr. Eyrich and the decision was made to stop preduisone (steroids) because of the very real possibility of the steroids causing plaintiff's acute condition of hepatitis to become "chronic hepatitis." Plaintiff has feared this would happen.

Plaintiff complained repeatedly of uncontrollable itching (page 9, Medical Record). At the trial, she expressed her suffering in this regard as so severe she "couldn't describe the itching" (Vol. 2, page 37) and that she "was scratched raw." (Vol. 2, p. 37). Apparently the peractin prescribed for the itching was of no effect. Nurses' Notes, p. 36, Medical Records.

A consultant's report on p. 12 of the Medical Record indicates further complications due to her recent prior surgery which has been aggravated by the treatment for hepatitis.

Plaintiff underwent innumerable urinalysis tests, blood tests and suffered needle injections for drawing blood and IV's to the point of making her arms hurt most painfully. *See* Nurses' Notes, p. 33, Medical records.

The Nurses' Notes, particularly at p. 33 in Medical Records', indicate the medicine ordered to control nausea

only made the plaintiff more nauseous."

2.Mental Anguish

All the while the plaintiff was in the hospital, she was visited (whenever doctors permitted) by her sister, Mrs. Joyce Martin, and by her husband, co-plaintiff, Joseph DeBattista and her son. From the outset she presented fears of becoming chronically ill, like her sister's case developed, expressing fear of cirrhosis of the liver and subsequently cancer. She had been well read in this area of medicine, prior to the hospital injection of hepatitis, when she had earlier sought to help her ailing sister. See *Martin v. Southern Baptist Hospital,* 352 So. 2d 351 (La. App. 4th Cir., 1977, writ denied 354 So. 2d 210). It was happening to her, only worse.

Mrs. DeBattista was very aware of the severity of this incurable disease. It became a continuing fear. She is still an outpatient at Ochsner Hospital. In addition she developed a morbid fear of syphillis and developing a mental disease when she found out the donor of the contaminated blood had a history of syphillis and schizophrenia. More, she felt "tainted" and "unclean" before her husband, for the same reason. She exhibits these same traits today, especially cancerphobia, a real possibility for one in her condition.

Where psychosis is involved, it would be easier to convince this court that it is actually an injury because the person suffering from psychosis is out of touch with reality and the effects of the illness generally can be readily observed. In the case of Mrs. DeBattista's neurosis, she does not have hallucinations. But her problems which are either causing anxieties or actual physical disturbance are completely functional in origin although induced by her physical trauma.

Thus, to the untrained eye the plaintiff may not appear to be injured. And her symptoms may give rise to the conclusion that she is either a malingerer or a chronic complainer, and in most cases a person who is thoroughly disliked.

Exaggeration, which is a symptom of this type of illness, is very hard for a layman to distinquish from false testimony. The mannerisms and personality created by this type of injury causes the observer to have a feeling of contempt and even utter dislike for the sufferer, instead of the feeling of sympathy that would generally generate by reason of a physical injury. Because the injury, even though considered as physical, be medical science, emanates from the mind; this may cause this court to lose patience with the bizarre and endless complaints listed herein.

This type of victim is the most misunderstood plaintiff of all litigations and generally is shortchanged in the course of justice. By reason of these facts, he is being constantly rebuffed and thwarted in his efforts to obtain just compensation for his severe injury, which in turn aggravates the original injury. All of this, of course, results in a vicious circle.

A neurosis or a psychosis is a physical injury and is not to be confused with mental suffering as that term is generally used in instructions in personal injury cases. Medical statistics reveal that 20% of neuroses result from traumas or injuries received from accidents; that the majority of injured persons in accidents have a neurosis in varying degrees. The majority of the cases of low back and neck sprains where the subjective complaints continue long after the objective findings are negative, this Court will find a form of neurosis in some degree. This is particularly true where the injury has been to the head. The patient has been told that the disease was trivial, the injury comparatively was insignificant, and that she would have made a recovery several months after

the injury occurred. Because these types of injuries are many times difficult to treat, the patient becomes disturbed and she begins to believe something's wrong with her. This agitation in turn causes pain. So, again, we set up the vicious circle. The patient, over a period of time, now becomes disturbed over the entire situation. This results in a functional disturbance.

When this Court begins to have an understanding of a psychic injury, it will then realize that this does not characterize Mrs. DeBattista as a malingerer, although the defense counsel certainly will seek to create this impression - - that a functional disorder is a symptom of neurosis.

The neurosis or psychosis injury can cause the same mental suffering that any physical injury can create. While it may appear no evidence has even been offered to prove Mrs. DeBattista's mental suffering, the facts and circumstances all indicate it.

What is a neurosis and a psychosis? It is not counsel's intention to give a detailed treatise on this complex field of medicine. Nor would he be so presumptuous as to give this learned court the impression that as an attorney he has the knowledge of the psychiatrist or the ability to write as a medical expert upon this knowledge. Many learned books and treatises have been written on this subject. It is counsel's only purpose to acquaint the Court with a superficial knowledge of this field of medicine in order that it may have enough of a general knowledge in order to convey the suffering of Mrs. DeBattista into a quantum award.

A psychosis in whatever form it may take puts the patient outside the touch of reality. In years past, instead of using the word "psychosis" we would use the word "insane." The pyschotic in his own world can either be miserable or very happy, depending upon who he thinks he is and

what his particular problems are. On the other hand, a person like Mrs. DeBattista, suffering from a neurosis, is miserable and she suffers the tortures of the damned.

It has been often said that the person who knows that 2 + 2 = 5 has a psychosis; but the person that knows that 2 + 2 = 4 and worries about it - he has the neurosis.

In a way, she would be blessed if Mrs. DeBattista with the neurosis, were out of touch with reality. The problems of life are magnified 100 fold. Fear is always a dreadful experience. However, anxiety is far worse than fear. When one is fearful she at least knows of a specific thing that she fears. But one having anxiety does not know what is causing it and she lives in a constant nightmare. When the sufferer has an over-convern of her body and ailments, then the form of her neurosis may be termed hypochondriasis. Actually, there is no such thing medically as a hypochondriac - - this term is actually a misnomer. Exaggeration is always a symptom of neurosis. A special instruction must be given to this Court in this type of case concerning this phenomenon which warns to distinguish between exaggeration as a symptom of an illness from false testimony.

Mr. DeBattista's terrible thoughts that have been buried in her unconscious before contracting the serum hepatitis have broken through her like escaping water from a broken dam. Unless she had an outlet, she would indeed become psychotic.

The outlet of these thoughts consists in converting them from thought processes into physical ailments. Many times, the conversion hysteria results symbolically from the type of traumatic experience.

The term "unconscious" is not used in the sense of someone who has been knocked out. The unconscious is a definite

part of the body. It is the dark closet where all thoughts that would not be conducive to our well-being are stored. We all have dark closets, and our ability to withhold these types of thoughts in them are dependent on the problems that befall us on the path of life and our own mental strength. That is why each person is differently affected mentally by trauma.

Another term: eqo - - acts as an umpire and determines which thoughts should be stored in the dark closet.

Repression is our ability to keep the door of the unconscious closed even though harmful thoughts may be building up in there and pressing against the barrier. Repression weakens, depending on the experiences of the individual and her mental ability to withstand shock.

When the injection of the viral hepatitis from a contaminated donor occurred, which was the straw that broke the camel's back, the door of the dark closet breaks down and the harmful thoughts which have been repressed and permitted us to live a normal life, break through for Mrs. DeBattista. They have to go someplace - - and that is what causes, in many instances what is known as the type of conversion hysteria from which she suffers.

When these thoughts are converted into bodily illness, this is called "primary gain." When we hear the word "gain" we understand it to be an advantage, but in this situation the only reason it is called "gain" is because the sufferer takes on a bodily ailment rather than becoming psychotic. So actually, the so-called "gain" is in reality a loss.

Another term: "secondary gain" - - like functional disorder is made to order for defense counsel, because it is easy to argue - - the secondary gain is malingerina for financial compensation or other reasons that result in the personal

betterment of Mrs. DeBattista. The fallacy of this argument must be carefully explained in order to do justice to Mrs. DeBattista. This is a very difficult concept to understand. Mrs. DeBattista before the hepatitis, may have been afraid of the ordinary experiences of life, had a desire to be sheltered, may not have received proper sympathy from her husband or son that she thought she deserved. When the diseased occurred, she unconsciously used the disease as a crutch. She gives up her will to live a normal life, gives in to those inward desires that had formerly been restrained, as all of us restrain certain impulses and desires.

Another type of secondary gain, which is even harder to explain, is the effect of litigation upon Mrs. DeBattista from the illness. The hepatitis has caused Mrs. DeBattista many times to be resentful because her life has been ruined through no fault of her own. Unconsciously, the desire for the verdict may be the desire to retaliate for the evil bestowed upon her. This is a subconscious symptom of the illness. It may be that because she has been disbelieved by her family, friends, doctors, and her attorney, that the damage award is the only way that will convince them and herself that all of her bizarre complaints are not fictional but true, and that she has been actually suffering. The award of a substantial amount vindicates her. This again is an unconscious motivation.

Here again, the use of the word "secondary gain" is misunderstood. While it is a gain in a certain sense of the term, it is in reality a great loss because Mrs. DeBattista is compelled, because of the unconscious results of that injury, to cling to her problems and cling to her disability.

Many physicians who are not psychiatrists, and even a few psychiatrists, will contend that Mrs. DeBattista will tend to recover after an award. The modern concensus of psychiatrists today is that this theory is a fallacy.

It is important to bear in mind that Mrs. DeBattista's exaggeration is not malingering. The term "exaggeration" as used as a symptom of neurosis, has no connotation to a falsehood. It merely means that she has either a mental preoccupation of mind of the complaints of her body which has been caused by the hepatitis or that the suffering caused by the hospital's tort has no organic basis. In either event, the suffering to Mrs. DeBattista is very real and, to her, the cause of it is purely theoretical.

The trial judge observed Mrs. DeBattista's being upset and nervous at Volume 2, p. 58. She showed certain signs to indicate psychic injury: over-talkative, overly possessed with the case, exaggerated demands, crying, insistence upon talking about topics unrelated to the accident, distrubed thought processes, relating the facts of the case and what happened to her in a completely unconcerned fashion as if she were discussing someone else, non-appropriate laughter, sadness or withdrawn expression or a mask-like look, uncalled for display of anger, describing bizarre symtoms, obviously overly-suspicious.

Undoubtedly, the man or woman who has the psychic injury is in the majority of cases treated unjustly either because of lack of recognition of the injury or because of the tribulations of dealing with the disturbed personality involved.

The neurosis is subtle and difficult to detect, particularly to the untrained and the unsophisticated. A few relatives and the employer of Mrs. DeBattista have recognized the mental problem and at least indicated that she was not this way before contracting the hepatitis.

On the other hand, Mrs. DeBattista is not out of touch with reality. She has different reactions -- the most common are anxiety, depression, conversion reaction, and hypochondriacal reaction. Anxiety is far worse than fear. Had she just

fear, she knows what is causing it to occur. With anxiety, she is unable to pinpoint what is causing the disturbance.

The only cure of her neurosis would be by a proper administration of a specialized treatment known as psychiatry, and practiced by a skilled specialist in this field of medicine.

3. LOSS OF FUTURE EARNINGS AND INCAPABILITY OF REALIZING FULL POTENTIAL

Counsel stipulated at the outset of the trial that the medical records and bills were authentic and undisputed. Thses uncontradicted reports indicate that, in addition to experiencing depressive neurosis with anxiety, Mrs. De Battista has suffered reduction in ability to exercise good judgment in regard to ordinary complexities and she continues to experience occasional crying fits. *Shively v. Pickens*, 346 So.2d 1314 (La. App. 3rd Cir. 1977).

From the uncontradicted evidence of the nature of Mrs. DeBattista's injury, its duration, her resultant loss of opportunity, this court could well conclude with reasonable certainty that the injury's consequences would continue into the future.

Depending on inflation and other factors, it is estimated loss of future earnings would exceed $100,000.00. Basic in that figure is the unfortunate truth that Mrs. DeBattista, by her loss of confidence due to this disease and its consequences, is deprived of realizing her true potential in her field. She abandoned competition for higher paying and more responsible clerkships offered in the Louisiana Supreme Court and the Courts of Appeal, among other challenges she did not care to meet. If Mrs. DeBattista had been offered and had accepted a job with the higher courts, she would have been earning about $16,000 a year, whereas she is now

earning $10,200, a difference of at least $6,000 a year with about a 20 year working life expectancy. Plaintiff's projected wage loss is in excess of $100,000.

Loss of earning capacity is an element of damages in cases such as this. *Jordan v. Travelers Insurance Co.*, 257 La. 995, 245 So.2d 151 (1971). This loss cannot be calculated with certainty and is subject to the discretion legally afforded trial courts. *Robinson v. Graves*, 343 So.2d 147 (La. 1977); *Robinson v. Garnett*, 238 So.2d 58 (La. App. 1st Cir. 1970); *Folse v. Fakouri*, 371 So.2d 1120 (La. 1979).

The trial record simply states that she was an employee of the State of Louisiana as a deputy clerk of court at Second City Court (Vol. 2, 51). While no pay figures were testified to, this court could easily extrapolate (even from minimum wage figures) what her losses in the future would be.

4. PUNITIVE DAMAGES IN INSTANT STRICT LIABILITY CASE ALLOWABLE

(a) Compensate plaintiff for injured feelings, mental distress and vexation.

(b) Punish defendants for injury to plaintiff.

(c) Punish and deter defendants and deter other potential wrongdoers for injuries to society caused by flagrant abuse of accepted norms.

The unconscionable practice of deliberately injecting contaminated blood into the unsuspecting consumer-patient, which the Louisiana Supreme Court has held results in strict liability of defendant should provide for exemplary damages. *See* Rice, 55 *Iowa Law Review*, 307 (1969), and generally, Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 Cornell L. O. 465 (1957); andComment, *Translating Sympathy for Deceived Consumers Into Effective*

Programs for Protection, 114 U. Pa. L. Rev. 395, 403 (1966).

There is no evidence that the Louisiana Lagislature meant to establish a deterrent less formidable than compensatory damages in medical malpractice and tort cases, especially where the Louisiana Supreme Court held the instant defendants strictly liable indicating malicious intention to deprive plaintiff of her rights or to do her other injury.

5. ATTORNEY'S FEES

For acts giving use to strict liability. *Harris vs. Bardwell*, 373 So. 2d 777 (La. App. 4th Cir., 1979).

G. CONCLUSION

Based on the Louisiana Supreme Court's finding that, indeed, the Hospital's blood transfusion was the cause of Mrs. DeBattista's viral hepatitis, the medical testimony should be looked at as uncontroverted that Mrs. BeBattista sustained a very severe and disabling injury. The trauma to her liver was extremely incapacitating and has required prolonged medical treatment. As evidence of this, this Court and the Louisiana Supreme Court acknowledged she was still receiving treatment as of the time of the trial, exactly 5 years later.

The triggering of her anxiety and neurosis is also clearly uncontradicted. An award of $225,000 for pain and suffering and mental anguish is reasonable.

A damages award of $100,000 for impairment of earning capacity for the plaintiff who, prior to the Hospital's injection of hepatitis aspired to a higher paying and more responsible court clerkship is not excessive. The husband's costs for medical expenses were stipulated; his additional damages uncontroverted.

Verdict or Truth?

There is a difference between the Common Law and Civil Code systems. In the Common Law, trials are conflicts and verdicts are decisions; the two sides "win" or "lose". In Louisiana, and other jurisdictions which observe the Roman Law or Napoleonic Code, the task is to arrive at the truth, as far as it can be perceived by human eyes, and the business of establishing the outlines of the truth falls not on a jury, which is strictly asked to enter a judgment, but by use of a civilian methodology. This inquisitional approach is unknown to Common Law, and encourages very wide powers of interrogation, of investigation, of the circumstances. Only when the Court is satisfied that liability has indeed been fixed (as here by reason of stict liability) and that the damages are reasonable will the case be resolved.

The civilian method of which we are so proud in Louisiana offers a grand opportunity to find the truth rather than just reach a verdict. The plaintiff asks this Court to employ that civilian methodology in making its determination of damages herein. Remand to overcome the plaintiff's and defendant's "minimal or less" evidence on which to base a determination of damages, *Spriggins v. Broadmoor Esso Service Center*, 263 So. 2d 365 (La. App. 4th Cir., 1972), or not. The maxim to be applied is *restitutio in integrum*, freely translated means, "The party who has sustained the damage is entitled to be put in the same condition as if the injury had not been suffered."

If this Court could restore Mrs. DeBattista to the woman she was (as pictured infra) 2/ before the injection of serum hepatitis donated by the syphilitic, schizophrenic Tom

---

2/ We have no picture of her since the debilitating effects of the disease took their toll so "ashamed" is she.

Watson (under the auspices of Southern Baptist Hospital) she would not ask one cent. But they can't. Hepatitis is incurable.

In an alternative to a remand for a full contradictory hearing on quantum of damages, plaintiff-appellants pray for $287,000 compensatory damages and an additional $287,000 in punitive damages where the defendants had actual or constructive knowledge of the blood transfused to the plaintiff as being unreasonably dangerous to normal use.

Respectfully submitted,

/s/ Abbott J. Reeves, Esq.
Abbott J. Reeves, Esq.,
Attorney for Plaintiffs,
Dolores DeBattista
Wife, or /and Joseph DeBattista,
419 Derbigny Street,
P.O. Box 465
Gretna, La. 70054-0465
Telephone 367-1212

APPENDIX D

COURT OF APPEAL
FOURTH CIRCUIT - STATE OF LOUISIANA
NO. 10596

DOLORES FACIANE, WIFE OF/AND JOSEPH C. DEBATTISTA
VERSUS
ARGONAUT-SOUTHWEST INSURANCE COMPANY, ET AL

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

The plaintiffs have filed a motion in this Court to remand the case to the Trial Court for further evidence on the question of damages. It is suggested by plaintiffs that the original trial in 1977 considered only the question of liability. That suggestion is simply untrue.

Undersigned counsel participated in the trial as the defendants' attorney and can assure this Court that the trial was not bifurcated as between liability and damages. As a result, the plaintiffs were authorized to and in fact did present testimony at the trial pertinent to the matter of any damages that might be due. The physician who treated Mrs. De Battista's hepatitis, Dr. Lloyd Eyrich, was called by plaintiffs to testify. Mrs. DeBattista herself testified about the effects of the hepatitis. Records from Southern Baptist Hospital and Ochsner Clinic regarding actual or alleged treatment for the hepatitis were introduced into evidence by the plaintiffs. Finally, the plaintiffs also introduced a number of medical and hospital bills generated by the treatment of Mrs. DeBattista's hepatitis, which bills were obviously pertinent only to the issue of damages.

Mrs. DeBattista contracted hepatitis in 1973 and filed suit in 1974. The case was tried in 1977, four years after the condition in question had occurred. The plaintiffs clearly had ample time to develop and present any evidence or testimony they wanted to on the issue of damages. They were in no way restricted or prevented from doing so at trial by the Trial Judge. There is considerable evidence in the record concerning the quantum question. It would be terribly unfair and prejudicial to require the defendants to retry that issue again at this time.

Accordingly, we respectfully submit that plaintiffs' motion to remand the case should be denied.

Respectfully submitted,

LEMLE, KELLEHER, KOLMEYER & MATTHEWS

/s/ William S. Penick
WILLIAM S. PENICK
Attorneys for Defendants
21st Floor, Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1241

CERTIFICATE

I hereby certify that a copy of the above and foregoing Memorandum in Opposition to Plaintiffs' Motion to Remand has been served upon plaintiffs' counsel, this 30th day of October, 1981.

/s/ William S. Penick
WILLIAM S. PENICK

APPENDIX E

COURT OF APPEAL
FOURTH CIRCUIT - STATE OF LOUISIANA
NO. 10596

DOLORES FACIANE, WIFE OF/AND JOSEPH C. DEBATTISTA

Plaintiffs-Appellants

versus

ARGONAUT-SOUTHWEST INSURANCE COMPANY, ET AL

Defendants-Appellees

ON REMAND FROM SUPREME COURT OF LOUISIANA
NO. 80-C-1772

ORIGINAL BRIEF ON DAMAGES ON BEHALF OF ARGONAUT-SOUTHWEST INSURANCE COMPANY AND SOUTHERN BAPTIST HOSPITAL DEFENDANTS-APPELLEES

WILLIAM S. PENICK
GEORGE E. CAIN
LEMLE, KELLEHER, KOHLMEYER & MATTHEWS
21st Floor, Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504 586-1241
Attorneys for Southern Baptist Hospital and Argonaut-Southwest Insurance Company, Defendants-Appellees

COURT OF APPEAL
FOURTH-CIRCUIT - STATE OF LOUISIANA

NO. 10596

DOLORES FACIANE, WIFE OF/AND JOSEPH C. DEBATTISTA

VERSUS

ARGONAUT-SOUTHWEST INSURANCE COMPANY, ET AL

ORIGINAL BRIEF ON DAMAGES ON BEHALF OF ARGONAUT-SOUTHWEST INSURANCE COMPANY AND SOUTHERN BAPTIST HOSPITAL

MAY IT PLEASE THE COURT:

After this Court affirmed the Trial Court's dismissal of plaintiffs' suit on the grounds that Southern Baptist Hospital was not negligent, the Supreme Court held that strict liability was applicable and remanded the case for a determination of quantum.

DAMAGES

Mrs. DeBattista underwent an abdominal hysterectomy at Southern Baptist Hospital on February 14, 1977. In connection with that surgery, she received three pints of blood by transfusion. Approximately two months later, she was diagnosed as having hepatitis, which is the subject of thes claim.

The record clearly demonstrates that Mrs. Bebattista's hepatitis was mild and short-lived. The diagnosis was initially made by Dr. Lloyd Eyrich, an internist, on April 16, 1973

(Dep. 5*), while Mrs. DeBattista would have still been convalescing from the hysterectomy performed only two months earlier. According to the history, her symptoms began three to four weeks before with nausea. (Dep. 5–6) She was admitted to Southern Baptist Hospital on April 18, 1973 and treated with bedrest and special diet for two weeks. (Dep. 7–8) Dr. Eyrich testified that she was doing "quite well" when discharged from the Hospital on May2, 1973. (Dep. 9) He thereafter saw her a few times in his office, the last being on June 29, 1973. (Dep. 11) Since hepatitis causes changes in the liver, Dr. Eyrich ordered a final series of liver function tests run on August 3, 1973 and they were all *normal*. (Dep. 11) Dr. Eyrich's testimony, offered by plaintiffs, was uncontradicted.

After being discharged by Dr. Eyrich, Mrs. DeBattista did not see another physician until she went to Ochsner Clinic a year later in August of 1974. (Tr. 54) Although an attempt of sorts was made at trial to connect her visits at Ochsner Clinic with her previous hepatitis, the evidence proves just the opposite. The plaintiffs called none of the doctors who saw her at Ochsner Clinic but simply offered her record there (Ex. P–1). The record shows that she first appeared at Ochsner Clinic on August 17, 1974. Mrs. DeBattista never entered the hospital there (Tr. 40–41) but underwent a number of tests on an out-patient basis. All tests for hepatitis were negative. In his typewritten Review Summary of September 16, 1974 in the chart, Dr. C. R. Fernandez reported that he found *no evidence of hepatitis, that Mrs. DeBattista* was in excellent health, and that her complaints of fatigue could be psychological in

---

* Because Dr. Eyrich's testimony was presented by deposition taken after trial in open court, page references here relate to his deposition (found in Volume I) instead of the transcript.

origin. Mrs. DeBattista returned to Ochsner Clinic a few more times in 1975 for things unrelated to hepatitis, such as a bladder infection and respiratory condition. (See generally Ex. P–1) There is no indication in the record that she saw a physician for any reason after that.

In summary, the medical evidence in this case indicated that Mrs. DeBattista's hepatitis had run its course in approximately four and a half months or less, with no residual effects. According to the history given to Dr. Eyrich, the first symptom possibly associated with hepatitis (nausea) appeared in the latter part of March, 1973. By August 3, 1973, at the latest, everything had returned to normal and she had been discharged from Dr. Eyrich's care. During that period of time between March and August, Mrs. De Battista spent two weeks in the hospital and the rest of the time at home. Even without the hepatitis, she would have been convalescing anyway during that time from the abdominal hysterectomy performed in February. There is no evidence of any pain associated with the hepatitis. And, by her own admission, she lost no pay from her work. (Tr. 51) She did not seek or receive medical care for hepatitis after August 3, 1973.

The plaintiffs' claim therefore involves two weeks in the hospital and four months of convalescence at home, part of which should be attributable to the hysterectomy rather than the hepatitis. We submit that $1,000 per week for Mrs. DeBattista's two weeks in the hospital and $1,000 per month for her four months at home, or $6,000 total (plus medical specials), would be very reasonable compensation.

CONCLUSION

The record indicates that Mrs. DeBattista had a mild case of hepatitis which resolved in four and a half months with-

out any residual effect. Damages should accordingly be set at no more than $6,000 plus the medical specials.

Respectfully submitted,

LEMLE, KELLEHER, KOHLMEYER & MATTHEWS

BY: /s/ WILLIAM S. PENICK
WILLIAM S. PENICK
GEORGE E. CAIN
21st Floor, Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1241
Attorneys for defendants

CERTIFICATE

I hereby certify that a copy of the above and foregoing Brief on Damages has been served upon plaintiffs' counsel, this 26th day of October, 1981.

/s/ William S. Penick
WILLIAM S. PENICK

APPENDIX F

Dolores Faciane, wife of/and Joseph
C. DeBATTISTA
v.
ARGONAUT-SOUTHWEST
INSURANCE CO., et al.
No. 10596.

Court of Appeal of Louisiana,
Fourth Circuit.

Jan. 27, 1982.

Before GARRISON, CHEHARDY and STOULIG, JJ.

GARRISON, Judge.

Plaintiff, while a patient at Southern Baptist Hospital, was administered blood which she alleged later caused hepatitis. After trial on the merits the trial court failed to find liability of Southern Baptist Hospital Blood Bank, Dr. Ralph M. Hartwell, Dr. George A. Hauser and the insurers, Argonaut-Southwest and St. Paul Fire and Marine, and dismissed plaintiff's suit. This court affirmed, 403 So.2d 26; however, the Supreme Court of Louisiana reversed the judgment of the trial court, 385 So.2d 518, finding liability based upon C. C. art. 2315 and *Loescher v. Parr*, 324 So.2d 441 (La. 1975), and remanded the matter to this court for the purpose of fixing quantum.

[1] Plaintiff then moved this court to remand the matter to the trial court for the purpose of adducing medical testimony based upon the contention that such evidence was not presented at the time of the initial trial of the matter. This contention is not supported by the record which revealed that medical testimony was presented on behalf of plaintiff. The record discloses that a period of five and one-half months were involved from the first evidence of hepati-

tis until plaintiff was completely cured.

Approximately one month after receipt of the blood, plaintiff began experiencing loss of appetite, became listless and was experiencing nausea. Plaintiff was referred to Dr. Lloyd C. Eyrick, and internist, by her gynecologist, Dr. Steel. Dr. Eyrick hospitalized her on April 18, 1973 at Southern Baptist Hospital and discharged her some 15 days later on May 2, 1973. During her hospitalization and subsequent recuperation at home, bed rest, Prednisone, Benadryl, Vistarel, Mylanta, Levsin, intravenous fluids and proper diet were prescribed.

On May 30, 1973, serium Bilirubin and S.G.O.T. tests were performed which disclosed mild elevation above normal and prescription of bed rest and proper diet with moderate activity was continued.

After discharge by Dr. Eyrick, she was tested at Ochsner and that test for hepatitis was found to be negative.

In view of the fact that this matter was tried three years after suit was filed and no evidence of additional medical treatment was presented, and the presumption being that the attorney for plaintiff has presented all of the available medical testimony, it can be concluded that the above history constitutes the entire treatment of plaintiff for hepatitis.

[2] Based upon the foregoing history, we are of the opinion that $15,000.00 amply compensates plaintiff for injury and all incidental expenses in connection therewith. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff in the full and true sum of $15,000.00 together with legal interest from date of judicial demand until paid. Defendants-appellees are to bear all cost of these proceedings.
RENDERED ON REMAND.

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF LOUISIANA NO. 82-C-0493

DOLORES FACIANE, WIFE OF/AND JOSEPH C. DeBATTISTA VERSUS ARGONAUT-SOUTHWEST INSURANCE COMPANY, ET AL

APPLICATION FOR WRIT OF CERTIORARI AND REVIEW TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, STATE OF LOUISIANA, NO. 10596, PANEL COMPOSED OF GARRISON, CHEHARDY, STOULIG, JJ., FOLLOWING REMAND FOR DETERMINATION OF QUANTUM OF AWARDS

APPLICATION FOR WRIT OF CERTIORARI OR REVIEW WITH BRIEF AND EXHIBITS IN SUPPORT THEREOF

**ABBOTT J. REEVES, Esq.
ATTORNEY FOR RELATORS-PLAINTIFFS
P.O. Box 465
419 DERBIGNY STREET
GRETNA, LOUISIANA 70054
TELEPHONE: (504) 367–1212**

Filed Feb. 26, 1982

INDEX

PAGE

STATEMENT OF THE CASE 1

ASSIGNMENTS OF ERROR 1

REASONS FOR GRANTING THE WRIT (LAW AND ARGUMENT 5

AFFIDAVIT 10

EXHIBITS

EXHIBIT I Original Petition 11

EXHIBIT II Supplemental Petition 19

EXHIBIT III Original Answer 21

EXHIBIT IV Answer to Supplemental Petition 21

EXHIBIT V Judgment of Trial Court 27

EXHIBIT VI Reasons for Judgment by Trial Court 28

EXHIBIT VII Original Opinion, *DeBattista v. Argonaut* 403 So.2d 26 (1981) (June 22, 1981) ..29

EXHIBIT VIII Rehearing denied by Louisiana Supreme Court 39

EXHIBIT IX Motion and Order for Remand to Civil District Court (Court of original Jurisdiction) for determination of quantum awards (October 26, 1981) 40

EXHIBIT X Opposition to Motion for Remand 43

EXHIBIT XI Motion to Strike 45

EXHIBIT XII Appeal brief on behalf of appellant-relators, DeBattista et al, on remand to Court of Appeals, Fourth Circuit 51

EXHIBIT XIII Opposition to Brief by Appellee, Argonaut Insurance Company 103

EXHIBIT XIV Opinion of Court of Appeals for Fourth Circuit (January 27, 1982, written by Judge Garrison) 107
EXHIBIT XV Plaintiffs' Exhibit No. 16 admitted evidence in trial court 110
EXHIBIT XVI Plaintiffs' Pre-Trial Order 111
EXHIBIT XVII Defendabt's Contribution to Pre-Trial Order 112
EXHIBIT XVIIIExcerpt from Defendant's Brief on Appeal to Fourth Circuit 113

PETITION FOR WRIT OF CERTIORARI OR REVIEW

The petition of Dolores Faciane, wife of/and Joseph C. DeBattista repectfully represents:

I.

Petitioners are aggrieved by the judgment and decision of the Court of Appeal, Fourth Circuit, and are entitled to have this Honorable Court review that judgment.

/s/ ABBOTT J. REEVES
ABBOTT J. REEVES, ESQ.
Attorney for Dolores Faciane DeBattista and Joseph C. DeBattista
P.O. Box 465
419 Derbigny Street
Gretna, Louisiana 70054
Telephone: (504) 367–1212

MAY IF PLEASE THE COURT:

STATEMENT OF THE CASE

On June 22, 1981, Justice Dennis wrote the (4-3) opinion for this Court, *DeBattista, et al vs. Argonaut-Southwest Insurance Co., et al,* 403 So.2d 26 (1981), holding the Southern Baptist Hospital and Blood Bank strictly liable for damages inflicted upon the plaintiff and "because the defendants prevailed in both lower courts, (where) no assessment of the plaintiff's damages has been made," remanded the case to the Court of Appeal for the Fourth Circuit for an assessment of damages.

On October 26, 1981, the plaintiffs, DeBattista, et al, filed in the Court of Appeals a *Motion and Order for Remand to Civil District Court for Determination of Quantum*

Awards, The Court of Appeals denied this Motion and rendered ab opinion awarding damages in the amount of $15,000.00 on January 27, 1982.

Relators-Plaintiffs make application for writ of review from these rulings. Relators seek, first, for remand to Civil District Court for evidentiary hearing for determination of quantum of awards; secondly, in the alternative, for additur to $240,000.00 total for both husband and wife.

ASSIGNMENTS OF ERRER

1. The Court of Appeals erred by not remanding the case to the Civil District Court for determination of quantum inasmuch as record was devoid of any evidence on which to make such a determination. *Capitol City Leasing Corp. v. Sidney Hill, d/b/a Logging Contractor, et al, 404 So.2d 935* (1981); *Nelson v. Zurich Insurance Co.*, 247 La. 438 , 172 So.2d 70 (1965); *Jacobs v. New Orleans Public Service, Inc.*, 374 So.2d 167, writ granted 376 So.2d 321 (La. App., 4th Cir., 1979); *Guste v. Jackson*, 429 U.S. 399, 50 L.Ed. 2d 638, 97 S. Ct. 657 (1977); *Placid Oil Co. v. Taylor*, 306 So.2d 664, on remand 313 So.2d writ granted 318 So. 2d 40, on remand 325 So.2d 313, writ denied 329 So. 2d 455 (1975); *Cousins v. Crest Air Conditioning and Heating Co., Inc.*, 305 So.2d 926, appeal after remand 332 So. 2d 543, writ denied 337 So.2d 530 (La. App. 4th Cir., 1974); *Bodin v. Bodin*, 392 So.2d 759 (1980); *Spriggins v. Broadmoor Esso Service Center*, 263 So.2d 365 (La. App. 4th Cir., 1972).

2. The Court of Appeals erred in not remanding the case to Civil District Court for determination of quantum award, inasmuch *only liability* was the issue at the trial level as evidenced by counsel's pre-trial order that the trial was limited to "contested issues of fact that (a) plaintiff sustained hepatitis as a result of the blood transfusion,

and (b) the negligence of Southern Baptist Hospital." (See excerpt from trial record marked herein as Exhibit 16.) The defendant's portion of pre-trial order did not indicate otherwise. (See excerpt from trial record marked herein as Exhibit 17.)

3. The Court of Appeals erred in not remanding this case to the Civil District Court, inasmuch as the only issue heard below (in trial court) was whether or not the hospital was liable. See statement by defendant's own counsel, William Penick, Esq., at Trial Transcript, page 28:

> "* * * Let's see if I can shorten this. The doctors are not party to the suit, they haven't been sued and anything the doctor did or did not do or anything they did wrong is really irrelevant to the issues before the case and before the (trial) court, which is the liability of the hospital." (Emphasis added)

See also:

Defendant's counsel admitted in his brief to the Court of Appeal on the original appeal to that court (dated August 21, 1979) that "* * * We agree with Judge Roberts that negligence is the only issue in the case and that plaintiffs did not carry their burden of proving negligence against the defendants." (Page 1 of Brief by Defendants, last paragraph). (See Exhibit 18.)

4. The Court of Appeals erred finding that "medical testimony was presented on behalf of plaintiff" where minimal or less evidence of medical testimony was presented by virtue of trial court heard only evidence on liability. Spriggins v. Broadmoor Esso Service Center, 263 So.2d 365 (La. App. 4th Cir., 1972).

5. Court of Appeals erred in considering medical records

which were admitted by stipulation only "to authenticity of the bills," and as to various times plaintiff visited the hospital.

6. The Court of Appeals failed to make an award for co-plaintiff Joseph C. DeBattista.

7, The Court of Appeals abused its discretion in awarding only "$15,000.00 (to Dolores DeBattista) for her injury and all incidental expenses in connection therewith." *Coco v. Winston*, 341 So.2d 332 (1976). comparison of comparable awards indicate awards to victim-wife of $225,000 and to husband in amount of $35,000.

8. The Court of Appeals erred in finding "plaintiff was completely cured after 5½ months," especially where unrefuted testimony of plaintiffs-relators indicate having the disease from February 21, 1973 and symptoms through trial date of January 26, 1977, and continues with residuals to present day; and doctors testified it is not a curable disease.

9. The Court of Appeals erred finding "a complete cure" despite infusion of blood from donor known to have serum B hepatitis and syphillis, which results in virus remaining in victim's blood stream for life (testimony of defendant's own doctor).

10. The Court of Appeals erred by not remanding the case to Civil District Court where entire trial transcript is lacking in presentation of evidence of damages and where, taken, as a whole, transcript reads that liability was the only issue tried, including the trial court's judgment. See Exhibits V and VI.

11. The Court of Appeals completely overlooked the fact the trial judge's judgment addressed itself solely to

liability issue.

12. The Court of Appeals failed to consider all damages suffered by plaintiff and her husband, including, but not limited to, pain and suffering; mental anguish; fright and shock; anxiety about future injury, both physical and economic; mental illness caused by or precipitated by the transfusion from the donor who had serum B hepatitis and syphillis; humiliation, sense of insult or indignity, mortification or wounded pride; loss of peace of mind and happiness; loss of enjoyment of life; aggravation of pre-existing injury; increased susceptibility as a permanent injury; permanent injury and inference of permanence from persisting symptoms; nausea and vomiting; loss of hair; physical injury; discomfort from itching and irritation; value of loss of housewife services; loss of consortium; husband's additional pecuniary losses; fear of future disability; fear of future illness; fear of economic loss; fear of safety of her husband and child ("zone of peril"); special damages; past medical expenses; future medical expenses; lost time and lost earnings; loss of future income; punitive damages; attorney's fees for acts giving use to strict liability.

GROUNDS FOR GRANTING THE WRIT (LAW AND ARGUMENT

1. THIS CASE SHOULE BE REMANDED TO TRIAL COURT OF ORIGINAL JURISDICTION FOR DETERMINATION OF QUANTUM OF AWARDS

The record is clear that the only issue tried in the court of original jurisdiction was that of liability. The pre-trial order clearly states the only issues to be tried are those of liability. Specifically, the pre-trial order stated the trial would be limited to "contested issues of fact that (a) plaintiff sustained hepatitis as a result of the blood transfusion, and (b) the negligence of Southern Baptist Hospital."

See Exhibits 17 and 18 attached hereto. The pre-trial order article, C. Cr.P. Article 1551, states the pre-trail order "limits the issues for trial." Further, the defendant's counsel emphasized it was a trial on the issue of liability, both during the trial when he said at trial transcript, page 28, that the only issue before the court was the liability of the hospital, and again in his appeal brief to the Court of Appeals, see Exhibit 18, wherein he stated "We agree with Judge Roberts that negligence is the only issue in the case. . ."

Judge Roberts' judgment further affirms his ruling was directed only to the liability issue. See Exhibits V and VI.

What "medical evidence" there was is clearly directed to the liability issue. At first glance, it may appear the medical testimony went toward a demonstration of damages; but here, by the very peculiar nature of the case, it was necessary to bring out certain medical and injury factors just to make the liability determination.

Plaintiffs, in year 1973, were faced with the "new" code article 1764 (B) (1). At that time, all around them, plaintiffs were cut down at the liability stage. Unfortunately, trial counsel Charles Maloney, Esq. has since died. Otherwise, he could be called to support his own transcript that the trial judge had only before him the liability issue. Once that was resolved, it was clear a hearing would be held to assess damages.

As Judge Julian Samuel wrote in *Spriggins v. Broadmoor Esso Service Center,* 263 So.2d 365 (La. App. 4th Cir., 1972), that where "the evidence (on quantum) in the record on the part of both the plaintiffs and the defendant is minimal or less and we are unable to reach proper quantum conclusions on the basis of that evidence. . . (we) remand the case (to district court) for further proceedings to determine the quantum awards to which the plaintiffs are entitled. . ." at 367.

It appears the Court of Appeals panel considered medical bills and various records introduced cold. The transcript clearly states these documents were admitted, by stipulation, for the sole purpose as to "authenticity of the bills," (Trial transcript, page 62) and to show the various times the plaintiff visited the hospitals (Trial transcript, page 44).

2. THE COURT OF APPEALS COMPLETELY OMITTED AN AWARD TO JOSEPH DeBATTISTA, CO-PLAINTIFF HUSBAND OF DOLORES De BATTISTA, VICTIM OF CONTAMINATED BLOOD TRANSFUSION.

Despite the fact Mr. DeBattista also suffered damages, both personal and economic, the Court of Appeals completely ignored his claim. It has been estimated in comparable situations he should be awarded at least $35,000 for his personal damages. Again, the matter should be remanded to the Civil District Court for an assessment of his losses.

3. IN THE ALTERNATIVE RELATORS SHOULD BE AWARDED $240,000.

THE COURT OF APPEALS ERRED FINDING RELATOR COMPLETELY CURED.

SERUM B (VIRAL) HEPATITIS IS NOT CURABLE.

MEDICAL EVIDENCE WAS MINIMAL OR LESS ON WHICH TO MAKE ASSESSMENT OF INJURY AND DAMAGES.

In the interest of judicial economy, to avoid repetition and to direct this Court's attention to the "bottom line" of this writ application, there was nothing in the record by which the Court of Appeals could have based its findings.

obviously, this Court faces the same dilemma the Fourth Circuit had - - a cold record, entirely devoid of substantive medical testimony and economic experts to support the making of a fair and just assessment of injuries and economic damages. Clearly, the solution is to remand the case for determination of quantum of awards after hearing evidence in that regard. In the alternative, reconsider the comperhensive brief filed in the Court of Appeals, marked herein as Exhibit XII.

The relators direct this Court's attention to relators' brief, reproduced in full herein as Exhibit XII, which clearly delineates the relator's injuries and arguments for a fair assessment of damages in the alternative to a remand.

The facts are, however, even if this Court were to seek out substantiation for an award in the record as it now exists, that there is no complete cure for serum B hepatitis; that, by testimony of defendant's own doctors, the virus remains in one's bloodstream for life; that the 5½ months' time period the Court of Appeals assumed is blatantly incorrect and without support in the record.

CONCLUSION

FOR THE FOREGOING REASONS, the plaintiffs-relators may justly complain that their claims did not receive as full and fair consideration as the issues required. Certainly, the obvious injuries and economic losses (hospitals and doctors bills alone were in excess of half the award) would seem to be more deserving of a higher award than the present opinion and award of the Court of Appeals reflects.

This Application for Writ should be granted, and the case summarily remanded to Civil District Court for the taking of evidence on which to assess injuries and quantum award for damages, or, in the alternative, after full consi-

deration of the list of injuries and economic losses set forth in Exhibit XII, an award of $240,000 for both husband and wife should be made by this Court.

/s/ Abbott J. Reeves, Esq.
Abbott J. Reeves, Esq.
Attorney for Relators-Plaintiffs
Dolores Faciane, Wife of/and
Joseph C. DeBattista
P.O. Box 465
419 Derbigny Street
Gretna, Louisiana 70054
Telephone: (504) 367-1212

Verification Omitted

APPENDIX H

SUPREME COURT STATE OF LOUISIANA

NO. 82-C-0493

DOLORES FACIANE, WIFE OF/AND JOSEPH C. DeBATTISTA

v.

ARGONAUT-SOUTHWEST INSURANCE COMPANY, ET AL

DEFENDANTS' OPPOSITION TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI ON ISSUE OF QUANTUM

MAY IT PLEASE THE COURT:

In their application for writs the petitioners suggest that the case should be remanded to the Trial Court for a determination of quantum because that issue was not raised at the trial. Nothing could be more incorrect. Whereas petitioners' present counsel did not participate in the trial, the undersigned counsel for defendants did no and speaks from personal knowledge. All issues, including quantum, were tried at the same time. The references (quoted by petitioners) from our previous briefs that the issue of negligence was the only one considered by the Trial Court is grossly misleading as presented by petitioners. We were referring there to the fact that the Trial Court's decision to dismiss the suit turned on the issue of negligence as opposed to liability or breach of warranty. The issue of quantum was agressively prusued by petitioners' then counsel at the trial of this matter.

On remand from this Court petitioners also moved the Fourth Circuit Court of Appeal to remand the case to the

Trial Court for further evidence on this point. We filed a short memorandum in opposition to that motion, recounting all of the evidence submitted by the petitioners at trial on the issue of damages. We now adopt that memorandum and attach a copy hereto. The Fourth Circuit apparently agreed that there was ample evidence already in the record on this issue and proceeded to make an award of damages to the petitioners in accordance with this Court's instructions.

As shown by the attached copy of the original Brief on Damages we filed in the Court of Appeal, Mrs. DeBattista's hepatitis resolved uneventfully and in a relatively short period of time. We submit that the Fourth Circuit was more than generous in awarding damages of $15,000 but was certainly justified in rejecting the petitioners' demand for damages in excess of $500,000. In any event, the Fourth Circuit's decision on quantum is amply justified by the record and should not be disturbed.

Respectfully submitted,
LEMLE, KELLEHER, KOHLMEYER & MATTHEWS

By _____

William S. Penick
Attorneys for Defendants
21st Floor, Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: 586–1241

APPENDIX I

THE SUPREME COURT OF THE STATE OF LOUISIANA

DOLORES FACIANE, WIFE OF/AND JOSEPH C. DeBATTISTA

vs.

ARGONAUT-SOUTHWEST INSURANCE COMPANY, ET AL

NO. 82-C-0493

In Re: **Dolores Faciane, Wife of/and Joseph C. DeBattista, applying for Certiorari, or Writ of Review, to the Court of Appeal, Fourth Circuit, No. 10, 596, Orleans Parish.**

March 19, 1982
DENIED,
WFM
JAD
PFC
JLD
FAB
JCW
HTL
Supreme Court of Louisiana March 19, 1982
/s/ illegible
Clerk of Court for the Court

APPENDIX J

CIVIL DISTRICT COURT FOR THE PARISH
OF ORLEANS
STATE OF LOUISIANA

DIVISION "F"

DOLORES FACIANE, ET AL
VS.
ARGONAUT-SOUTHWEST INS.
COMPANY, ET AL

NO. 566-288

DOCKET No. 4

REASONS FOR JUDGMENT

In dismissing plaintiff's suit this Court does not find that there is any implied warranty in connection with the sale of blood. Said warranty this Court believes is protected by specific statute.

This Court further believes that no evidence was adduced that convinces it there was negligence in preperation of the blood, the infusion of the blood or the storage of the blood.

/s/ HENRY J. ROBERTS, JR.
JUDGE

Dated March 23, 1978